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Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

vs.

TRACY JOHNSON,

Respondent.

On Petition For Writ Of Certiorari To The New Mexico Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), did the New Mexico Supreme Court violate this Court's binding precedent as announced in *Chapman v. California*, 386 U.S. 18 (1967), and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), by concluding that harmless-error analysis under federal constitutional law permits an appellate court to subjectively weigh the extent to which impermissible evidence was cumulative to or corroborated other similar evidence of guilt?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, State of New Mexico, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New Mexico Supreme Court entered in this matter on August 20, 2004.

OPINION BELOW

The opinion of the New Mexico Supreme Court is Appendix A. It is reported as *State v. Johnson*, ___ N.M. ___, 98 P.3d 998 (2004).

JURISDICTION

The New Mexico Supreme Court rendered its opinion on August 20, 2004. The court denied Petitioner's timely motion for rehearing on September 24, 2004. The denial order is Appendix C. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Constitution of the United States, Fourteenth Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Article VI, Supremacy Clause:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

STATEMENT OF THE CASE

On December 14, 2000, Anthony Granado and Ronnie Lujan were beaten, robbed, and murdered in Granado's home in Carlsbad, New Mexico. Granado was shot three times, once in the head and twice in the chest. His corpse also displayed several lacerations that were consistent

with being struck by a hard, curved object such as a tire iron. Lujan was shot twice, once in the head, once in the chest. Lujan also had a deep laceration in his scalp that was consistent with being struck by a tire iron. A ballistics expert testified that all five shots were fired from the same .25 caliber semiautomatic pistol.

On the evening of the slayings, Jeff Hoff, Coley Ingram, Jamal Young, and Respondent twice went to Granado's apartment to buy cocaine. On the second trip, the four consumed cocaine in a back bedroom with the two victims. Respondent and Ingram went into the bathroom. Hoff heard loud talking that sounded like an argument. When the two left the bathroom, Hoff followed them down the hall. Respondent told Hoff "we're going to jack [rob] them." As he produced a tire iron, Ingram asked Hoff if he was "in or out." Hoff told them he wanted no part of it and left.

Respondent was the first to enter the bedroom. As Hoff left the apartment, Ingram was shutting the bedroom door. Young was also in the bedroom with the victims. Hoff sat in the car and watched as Young repeatedly carried personal property from the apartment. Hoff subsequently heard five gunshots. Shortly thereafter, Young, Ingram, and Respondent came out of the apartment. As they left the scene by car, Hoff asked Respondent, "Did you smoke them?" Respondent replied, "Yeah." He repeatedly proclaimed that he was a "G" which Hoff took to mean "gangster."

Respondent, Hoff, and Young eventually arrived at Respondent's father's house where Hoff tried to call his mother to get a ride home. Respondent ordered him to

hang up the phone and told someone to keep an eye on him so that he would not go to the police.

On December 31, 2000, the police arrested Young on an unrelated charge. Young waived his rights and gave a statement. The trial court admitted the statement as one made against Young's penal interest and the jury heard a redacted tape-recorded version of it.

In the statement, Young related that he, Respondent, Hoff, and Ingram went to Granado's apartment twice that day. The second time, the four of them and the two victims were in a bedroom. Respondent and Ingram left the room. Shortly later they returned and Ingram announced they were going to "jack" Granado and Lujan. Young admitted gathering up the victims' property. He also admitted being in the bedroom when Ingram displayed the tire iron and announced the "jack move" to the victims. He saw Respondent with a handgun. He also told the officers that during this entire episode, Respondent and Ingram were each armed with one or the other of the two weapons. Young continued to carry away property and went back into the apartment for the last time just after he heard gunshots. According to Young's statement, after the shots were fired, Respondent and Ingram also began to grab some of the victims' property.

Respondent testified on his own behalf. He admitted being present in the bedroom, but denied that he participated in the robbery, shot anyone, beat anyone or ever had the gun. He also testified that he tried to stop Ingram from killing the victims.

The district attorney charged Respondent with two counts of first-degree murder, armed robbery, conspiracy, felon-in-possession of a firearm, and tampering with

evidence. A jury convicted Respondent of all counts in the criminal information. The trial court sentenced Respondent to a total of sixty-years imprisonment.

On direct appeal to the New Mexico Supreme Court, Respondent argued that Young's statement was unconfronted, inadmissible hearsay. After full briefing, oral argument, and submission of the case in the state court, this Court handed down *Crawford v. Washington*, 541 U.S. 36, ___, 124 S.Ct. 1354, 1374 (2004), holding: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." In light of this holding, the state supreme court ordered supplemental argument. The parties briefed the effect of *Crawford* on the case at bar. Subsequently, in a four-to-one decision, the state court reversed all of the convictions except the one for tampering with evidence and ordered a new trial. Petitioner moved for a rehearing. The court denied that motion on September 24, 2004, and issued its mandate.

Petitioner now seeks a writ of certiorari from this Court to review the judgment and opinion of the New Mexico Supreme Court.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment guarantees an accused the right to confront the witnesses against him. This right is incorporated into the Fourteenth Amendment's guarantee of due process of law to each citizen. *Harrington v. California*, 395 U.S. 250 (1969). The Constitution establishes itself as the supreme law of the land and requires that the

courts in the several states are bound to adhere to it and to the decisions made under it.

In the case at bar, the New Mexico Supreme Court departed from the standard governing harmless-error analysis announced by this Court in *Chapman v. California*, 386 U.S. 18 (1967). The New Mexico courts have consistently used the *Chapman* standard over the last three decades in evaluating claims of constitutional error. *See State v. Jones*, 80 N.M. 753, 461 P.2d 235 (Ct. App. 1969); *State v. Moore*, 94 N.M. 503, 612 P.2d 1314 (1980); *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982); *State v. Jett*, 111 N.M. 309, 805 P.2d 78 (1991); *State v. Martinez*, 122 N.M. 476, 927 P.2d 31 (Ct. App. 1996), and *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1996). Contrary to these precedents and this Court's holding in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the New Mexico Supreme Court now requires a reviewing court to weigh the effect of cumulative or corroborative evidence on other properly admitted evidence to "assess the degree to which [impermissible] evidence corroborated other similar evidence of the defendant's guilt." *Johnson*, ___ N.M. at ___, 98 P.3d at 1008. At a distance this sounds like a part of the *Van Arsdall* formula, but closer examination reveals that the court has dramatically altered the degree to which a reviewing court may substitute its judgment for that of the jury.

In *Van Arsdall*, this Court set down a specific formula for harmless-error analysis, requiring a reviewing court to evaluate: (1) "the importance of the witness' testimony in the prosecution's case," (2) "whether the testimony was cumulative," (3) "the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points," (4) "the extent of cross-examination

otherwise permitted," and (5) "the overall strength of the prosecution's case." 475 U.S. at 684. The Chief Justice wrote, "Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Id.* at 681. *See also Neder v. United States*, 527 U.S. 1 (1999); *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

The New Mexico Supreme Court's majority opinion repeated the *Van Arsdall* formula. However, by creating a new mechanism for evaluating the *impact* of improperly admitted evidence, the court created a structure that virtually assures that *Crawford*-type error will be reversible error. The formula used subjects the prosecution's evidence to a subjective weighing test in which the relative quantity, quality, and types of evidence will be scrutinized by a reviewing court. The court has thus moved away from the holdings in *Chapman* and *Van Arsdall* and now permits a reviewing court to parse the record to subjectively determine if a jury would have convicted an accused without the inadmissible evidence. Constitutional error in New Mexico has, as a practical matter, risen to structural error or an error that requires *per se* reversal. Consequently, the standard previously announced and reiterated by this Court becomes no standard at all.

This Court has made it abundantly clear that only extraordinary circumstances permit a reviewing court to disturb a jury's verdict. In *Schneble v. Florida*, 405 U.S. 427 (1972), this Court stated:

> [U]nless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. In this case, we conclude that the "minds of an average jury" would not have found the State's case significantly less persuasive had the testimony as to [the unavailable co-defendant's] admission been excluded. The admission into evidence of these statements, therefore, was at most harmless error.

Id. at 432 (citation to *Chapman* omitted).

In *Harrington*, this Court reaffirmed the holding in *Chapman* and said:

> It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of [the two co-defendants'] confessions and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average juror.

395 U.S. at 254; *see also Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (error is harmless if it did not have a "substantial and injurious effect or influence in determining the jury's verdict"). This Court has never required more than the straightforward test announced in *Chapman* and reaffirmed in *Van Arsdall*.

In contrast to this guidance, the New Mexico Supreme Court here undertook a weighing process that categorized the character and quantity of the evidence in an attempt

to divine the impact of each piece of the evidentiary puzzle on the jury. The court held:

> The probative force – and therefore the possible prejudicial effect – of a particular piece of evidence tends to decrease the more redundant that evidence is in the context of other similar evidence. Therefore, only in very clear instances of accumulated evidence – where the evidence is so redundant that its corroborative effect is negligible – should the improper admission or exclusion of one accretion of such evidence be considered "cumulative" for purposes of our harmless-error analysis.

Johnson, ___ N.M. at ___, 98 P.3d at 1008.

The court rejected the Petitioner's argument that the substance of Young's statement was revealed in the testimony of others, particularly that of Hoff, the eyewitness, and through Respondent's confession. In dismissing the argument that this was exactly the kind of cumulative evidence discussed in *Van Arsdall*, the court wrote:

> Regarding the second *Van Arsdall* factor, the State argues that portions of Young's statement were merely cumulative of Hoff's testimony on the same points, and therefore harmless beyond a reasonable doubt. First, however, whether evidence is cumulative is merely one factor in the "host of factors" outlined in *Van Arsdall*. Therefore, improperly admitted evidence that is cumulative is not *ipso facto* harmless beyond a reasonable doubt: the reviewing court must further inquire into the *effect* that evidence might have had on the jury's verdict. Second, we clarify that when determining whether certain erroneously admitted evidence is "cumulative," the

> reviewing court must carefully assess the degree to which that evidence corroborated other similar evidence of the defendant's guilt. To the extent the evidence corroborates, and therefore strengthens, the prosecution's evidence, it cannot be deemed "cumulative" as we understand that term.

Id. (internal citation omitted) (emphasis in original).

Although seemingly applying *Van Arsdall*, the New Mexico Supreme Court created a new formula for evaluating the effect of unconstitutionally admitted evidence on the jury's decision. After noting earlier decisions in which the New Mexico courts have held that a Confrontation Clause violation was harmless where the erroneously admitted statement was cumulative to some evidence and corroborated by other evidence, the dissenting justice reasoned:

> As with the factor of cumulative evidence, the existence of evidence conflicting with the improperly admitted evidence is only one of several *Van Arsdall* factors relevant to a harmless error inquiry. The bare existence of conflicting evidence, without reference to the quality and quantity of that evidence in relation to the properly admitted evidence of guilt, does not lead to automatic reversal under the *Chapman* harmless error standard.

Johnson, ___ N.M. at ___, 98 P.3d at 1016.

As the dissenting justice further concluded, the bar has been raised so high that the prosecution on appeal has little chance of meeting the newly announced requirements for demonstrating harmless error:

> Not only does this new description of harmless error conflict with *Neder*, I believe it also requires the State to prove the impossible. All evidence offered by the prosecution in a criminal trial, if properly admitted by the trial court, will to some degree strengthen or corroborate the evidence of guilt. In order to be admissible, the prosecution's evidence must be relevant, and by definition, relevant evidence has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 11-401 [New Mexico Rules Annotated] 2004. In my view, this new standard adopted by the majority effectively creates a rule of automatic reversal for *Crawford*-type errors, contrary to binding precedent from the United States Supreme Court.

Id. at 1014.

The subjective comparison of cumulative and corroborative evidence in the New Mexico Supreme Court's majority opinion is a heretofore unknown function of the *Chapman* analysis. Never before has the prosecution on appeal been required to show the "probative force" of duplicate, triplicate or quadruplicate cumulative or corroborative evidence in order to sustain a conviction. *Id.* at 1008.

This field of jurisprudence is well settled in other jurisdictions. Relying on *Van Arsdall*, state courts strictly apply the test reiterated therein without subjectively scrutinizing the quantity and quality of corroborating or cumulative evidence. *See, for example, Hannon v. State*, 84 P.3d 320, 322 (Wyo. 2004) ("The improper denial of a defendant's opportunity to confront witnesses against him

is subject to the harmless-error analysis."); *State v. Oscarson*, 845 A.2d 337, 348 (Vt. 2004) ("In calculating harm, this Court uses the factors set forth in *Delaware v. Van Arsdall*."); *State v. Atkinson*, 276 Kan. 920, 930, 80 P.3d 1143, 1151 (2003) ("[O]nce we have determined that there is a constitutional violation, we apply the federal constitutional harmless-error analysis."); *Andrews v. State*, 344 Ark. 606, 617, 42 S.W.3d 484, 492 (2001) ("In *Delaware v. Van Arsdall*, the Supreme Court set forth the factors for determining whether a violation of the Confrontation Clause was harmless error.") (citation omitted); *State v. Welch*, 760 So.2d 317, 321-22 (La. 2000) ("The violation of defendant's right to confrontation may be harmless error, and is to be analyzed by assuming that the damaging potential of 'face-to-face' confrontation was fully realized, then asking whether the reviewing court may conclude that the error was nevertheless harmless beyond a reasonable doubt.") (internal citation omitted).

In the last analysis, the question is not what an appellate court makes of the evidence adduced during trial, but whether the jurors needed the improperly admitted out-of-court statement to arrive at their destination. *Neder*, 527 U.S. at 20.

In its assessment, the New Mexico Supreme Court's majority opinion placed extreme reliance on Respondent's testimony. As the dissenting justice discussed, Respondent's "story" was "improbable" given his admissions, the physical evidence of injuries with two weapons, his cool, calm demeanor in the aftermath of the slayings, and his attempts to conceal the crime. *Johnson*, ___ N.M. at ___, 98 P.3d at 1015-16. Thus, the jury did not need Young's statement to find the improbabilities (or even impossibilities) in what Respondent told them. On a cold record, no

one can know how Respondent behaved while on the stand or how the vigorous cross-examination diminished his credibility. This new approach indeed places the appellate courts in the stead of the original trier of fact.

The dissenting justice also summarized the independent strength of the prosecution's case, *sans* the testimonial statement of the unavailable co-defendant, as follows:

> The jury's task in this case was not as difficult as it would be in most murder cases tried before a jury. Defendant's own testimony established that Defendant was at the scene of the crime, that he arrived at the scene with an undisputed perpetrator of the crime and had a discussion with this individual about the crime before it occurred, and that he was aware that his cohort was armed with a gun. It was also undisputed that Defendant chose to remain in the room during the robbery despite prior knowledge of Coley's intent, an awareness that Coley had a gun, and the same opportunity to leave exercised by Hoff. The only question for the jury was whether, while voluntarily in the room with his gun-wielding friend during the robbery, Defendant participated in the crime. There was an abundance of evidence heard by the jury, supporting Defendant's complicity with Coley, including an eyewitness's testimony that he initiated the robbery, a confession of guilt from Defendant, powerful evidence of a consciousness of guilt, and eyewitness testimony from two witnesses of Defendant's behavior after the fact being consistent with his participation in the crime.

Johnson, ___ N.M. at ___, 98 P.3d at 1016.

Petitioner respectfully submits that this quantity and quality of evidence is exactly that contemplated by this Court in *Chapman, Van Arsdall*, and a host of other cases. If more than this is now required as a matter of federal constitutional law as applied in New Mexico, then the harmless-error doctrine will become an immovable roadblock and a useless exercise in the New Mexico appellate courts. This substitution of the appellate court's judgment for that of the "average jury" is the danger inherent in requiring any more than this Court has already given as the test for harmless error under the United States Constitution. By this extensive modification, the state supreme court has effectively rejected this Court's binding precedent on this well-settled question of federal constitutional law. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasonings rejected in some other line of decision, the [courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Nothing in *Crawford* expanded, redefined, or overruled the harmless-error formula previously announced by this Court. In fact, *Crawford* specifically does not reach the issue of harmless error at all. 541 U.S. at ___, 124 S.Ct. at 1359 n.1.

The guidance offered in the seminal case recognizing exceptions to the Confrontation Clause, *Mattox v. United States*, 156 U.S. 237, 243 (1895), rings true to this day: "The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."

As this Court stated in *Arizona v. Fulminante*, 499 U.S. 279 (1991):

> In applying harmless-error analysis to these many different constitutional violations, the Court has been faithful to the belief that the harmless-error doctrine is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."

Id. at 308, *quoting Van Arsdall*, 475 U.S. at 681.

Petitioner respectfully submits that the new harmless-error formula announced by the New Mexico Supreme Court, with its attendant subjective classification and categorization of the quantity and quality of the types of evidence adduced, sacrifices the public's legitimate interest in the fair, evenhanded enforcement of its criminal laws by permitting a reviewing court to substitute its judgment for that of the jury.

CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review the judgment and opinion of the New Mexico Supreme Court.

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

OPINION NUMBER: 2004-NMSC-029

Filing Date: August 20, 2004

Docket No. 27,535

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

TRACY JOHNSON,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF EDDY COUNTY
Jay W. Forbes, District Judge

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OPINION

CHAVEZ, Justice.

{1} A jury convicted Defendant Tracy Johnson of two counts of first-degree felony murder, contrary to NMSA 1978, § 30-2-1(A)(2) (1994); armed robbery, contrary to NMSA 1978, § 30-16-2 (1973); conspiracy to commit armed robbery, contrary to NMSA 1978, § 30-28-2 (1979) and Section 30-16-2; possession of a firearm by a felon,

contrary to NMSA 1978, § 30-7-16(A) (2001); and tampering with evidence, contrary to NMSA 1978, § 30-22-5 (1963, prior to 2003 amendment). We review Defendant's convictions pursuant to Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A)(1) NMRA 2004.

{2} Defendant argues the trial court violated his right to confront the witnesses against him when it admitted a tape recording of an unavailable accomplice's custodial police interview, and that such error was not harmless beyond a reasonable doubt. Since Defendant filed this appeal, the United States Supreme Court decided *Crawford v. Washington*, 124 S. Ct. 1354 (2004), which held that out-of-court "testimonial" statements are inadmissible against a criminal defendant absent a showing of both "unavailability and a prior opportunity for cross-examination." *Id.* at 1374. The State concedes the recording at issue in this case was admitted in violation of Defendant's Sixth Amendment right of confrontation under *Crawford*. Although the State acknowledges this case "presents an extremely close call on the issue of harmless error," the State asks that we decide this close case in its favor, on the basis that the improper admission of the accomplice statement was harmless beyond a reasonable doubt. However, because the accomplice's inadmissible statement provided key evidence directly inculpating Defendant, and the remaining circumstantial evidence against him, although strong, was disputed, we conclude the error was not harmless with respect to all convictions except the conviction of tampering with evidence. Accordingly, we reverse Defendant's convictions of felony murder, armed robbery, conspiracy to commit armed robbery, and felon in possession of a firearm, and we affirm Defendant's conviction of tampering with evidence.

I. Background

{3} The two victims were beaten, robbed, and killed inside a residence belonging to one of them. One victim had been shot three times – once in the head, once in the chest, and once in the back – and had been struck in the head by a hard, curved object, consistent with a tire iron. The other victim had been shot twice – once in the head and once in the chest – and had also been struck in the head by a hard, curved object. A ballistics expert testified that all five bullets were fired from the same firearm. However, neither the murder weapon nor any of the items stolen from the house were ever recovered.

{4} It was undisputed at trial that on the evening of the killings, Defendant, along with acquaintances Jamall Young ("Young"), Coley Ingram ("Coley"), and Jeff Hoff ("Hoff"), returned to the victim's house to purchase cocaine, where they had made a drug purchase earlier in the day with Coley's brother, Wayne Ingram ("Wayne"). During this second drug transaction but prior to the commencement of the robbery, Defendant and Coley went by themselves into a bathroom, leaving Hoff and Young in the bedroom with the two victims. What occurred after these events is disputed, and the State's theory is significantly different from Defendant's.

{5} The State argued that, while in the bathroom, Defendant and Coley formed a conspiracy to commit armed robbery, then used a firearm and a tire iron to rob and murder the two victims. Defendant's theory at trial, directly supported by his own testimony, was that while in the bathroom he not only rejected Coley's proposal to rob the victims, but believed he had talked Coley out of committing a robbery. Further, Defendant claimed that once

the robbery commenced, he tried to stop Coley from committing the robbery by urging him to put away the firearm.

{6} Over Defendant's objections at trial, the State introduced the tape-recorded police interview of Young. Young did not testify at trial, nor did Defendant at any time have an opportunity to cross-examine Young on his statement. In the portion of the statement that was played for the jury, Young provided the only direct evidence that Defendant wielded a weapon or participated as an accomplice in the crimes. Further, Young's statement provided the only direct evidence that Defendant himself stole property from the victims.

II. Young's Custodial Statement

A. Application of *Crawford*

{7} The State does not dispute that the tape recording of Young's police interview was admitted in violation of Defendant's Sixth Amendment right of confrontation under *Crawford,* which held that out-of-court "testimonial" statements are inadmissible unless there has been a showing of "unavailability and a prior opportunity for cross-examination." 124 S. Ct. at 1374. The Supreme Court did not decide, however, the full scope of the term, "testimonial":

> We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations.* These are the modern practices

> with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. (footnote omitted and emphasis added). Because Young's custodial interview falls squarely within the class of "testimonial" evidence under *Crawford,* 124 S. Ct. at 1365, we need not in this case attempt to delineate more fully the scope of that term. We simply hold that, under *Crawford,* because Defendant did not have an opportunity to cross-examine Young, the admission of Young's statement constituted a per se violation of Defendant's Sixth Amendment right of confrontation. We must address, therefore, whether the violation was harmless in this case.

B. Principles of constitutional harmless error

{8} Except in cases involving "structural" errors, which are subject to per se reversal, we are bound to apply the harmless-error analysis outlined in *Chapman v. California,* 386 U.S. 18, 24 (1967), to federal constitutional errors. *See Neder v. United States,* 527 U.S. 1, 7-8, 15-16 (1999). In order to conclude a non-structural constitutional error does not require reversal, we must conclude the error was "harmless beyond a reasonable doubt." *Chapman,* 386 U.S. at 24. Underlying the *Chapman* analysis is the acknowledgment "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22. Thus, the United States Supreme Court in *Chapman* fashioned a rule that would balance the Court's inherent interest in vindicating federal constitutional guarantees against the utility of blocking the traditional practice of automatically "setting aside convictions for small errors or defects that

have little, if any, likelihood of having changed the result of the trial." *Id.*

{9} The Court has articulated the constitutional harmless-error standard variously since *Chapman* was decided, but the central focus of the *Chapman* inquiry has always been "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23 (quotation marks and quoted authority omitted). Stated differently, in the context of an essential element that was not presented to the jury, the reviewing court must be able to "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error[.]" *Neder,* 527 U.S. at 19; *see Sullivan v. Louisiana,* 508 U.S. 275, 279 (1993) ("The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."). Once the constitutional error has been established, the burden is on the State to demonstrate the error is harmless beyond a reasonable doubt. *See Brecht v. Abrahamson,* 507 U.S. 619, 630 (1993).

{10} In conducting this inquiry, the reviewing court must ever bear in mind that criminal defendants have a constitutional right to have a jury, not appellate court judges on review, decide guilt or innocence. *See Sullivan,* 508 U.S. at 279 ("[T]o hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee."); *cf. Rose v. Clark,* 478 U.S. 570, 578 (1986) (noting that harmless-error review does not apply where the judge directs a verdict, because "the wrong entity judged the defendant guilty"). Therefore, it is imperative

that a reviewing court be guided not by its own assessment of the guilt or innocence of the defendant – a matter which is irrelevant to the question whether the constitutional error might have contributed to the jury's verdict – but rather by an objective reconstruction of the record of evidence the jury either heard or should have heard absent the error and a careful examination of the error's possible impact on that evidence. *See Yates v. Evatt*, 500 U.S. 391, 404-05 (1991) (examining the "probative force" of the constitutional error against the "probative force" of the evidence considered by the jury), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62, 73 n. 4 (1991). If, at the end of that examination, we conclude there is a reasonable possibility the evidence complained of might have contributed to the conviction, we must reverse.

{11} In the specific context of a Confrontation Clause violation, as we are faced with in this case, the Supreme Court in *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), stated that the reviewing court must examine various factors in conducting its harmless-error inquiry:

> These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

We emphasize that constitutional error must not be deemed harmless solely based on overwhelming evidence of the defendant's guilt; the overall strength of the prosecution's case is but one factor in our harmless-error analysis. The central focus of the inquiry, for which the *Van*

Arsdall factors are but a guide, is whether there is a reasonable possibility the erroneous evidence might have affected the jury's verdict.

C. Testimony admitted at trial

1. Testimony of Hoff

{12} Hoff testified that he was in the bedroom when Defendant and Coley left the room together. Hoff began to wonder what they were doing, and he left the room to look for them. Hoff found them in the bathroom discussing something. Defendant then told Hoff to "get out" and that they were "handling business." After Defendant shut the bathroom door, Hoff stood by the door for about twenty seconds, trying to listen in on the conversation. Hoff could not make out what the two men were saying, but it sounded "like arguing, like maybe kind of anger." It sounded as though "one person didn't want to do it and one person did." After about twenty seconds, Defendant and Coley came out of the bathroom and returned to the bedroom.

{13} During his direct examination, Hoff testified that as the two men entered the bedroom, Defendant said to the two victims, "[W]e're gonna jack ya," which Hoff interpreted to mean they were going to rob the two men. Hoff's testimony on this point, however, was called into question on cross-examination: there, Hoff conceded that he had earlier told the police that it was Coley, not Defendant, who said those words. Coley then turned to Hoff and, while pulling a tire iron out of his pants, asked Hoff whether he was "in or out." Hoff responded, "I don't want no part of this," turned around, left the house, and waited for them in the car.

{14} At no point did Hoff see Defendant with a firearm, nor did he ever see Defendant holding a tire iron. Further, at no point did Hoff see Defendant in possession of any of the stolen property.

{15} As Hoff was sitting outside in the back seat of the car, Young brought an assault rifle out from the house and placed it in the back seat next to him. Young made two more trips with stolen property out to the car over a period of several minutes. After Young's third trip to the car, Hoff heard five gunshots report from the house. Moments later, Defendant, Young, and Coley emerged from the house. Then Defendant and Young got into the car while Coley stayed behind. Defendant drove the car back to Defendant's house. During the ride, Hoff inquired whether the victims had been killed. Hoff could not recall whether he had asked Defendant if Defendant himself killed the victims or whether he had asked Defendant and Young if they had killed the victims. Nevertheless, although disputed by Defendant, Hoff testified that Defendant replied, "Yeah," when the question was asked. According to Hoff, Defendant also repeatedly proclaimed that he was a "G," which Hoff interpreted to mean a "gangster."

{16} Finally, Hoff testified that when the three men – Defendant, Young, and Hoff – returned to Defendant's house, Wayne was there. Hoff wanted to leave, so he picked up the telephone to call his mother for a ride home. Defendant told Hoff to hang up the phone and to walk home. Defendant then told Wayne to "watch" Hoff to ensure he does not "go to the cops." After Defendant left the room, Hoff again used the telephone to call his mother. Hoff's mother picked him up at the canal about a quarter of a mile away. Wayne walked with Hoff to the canal, where Hoff's mother gave Wayne a ride to his destination.

2. Testimony of Wayne Ingram

{17} Wayne Ingram, although he was not present during the commission of any of the crimes, did spend portions of the evening with the other men as they drove around Carlsbad, including a stop at the victim's house when the group first went there to purchase drugs. Wayne testified about a telephone call he received sometime after midnight on the night of the killings, allegedly sometime before the commencement of the robbery. During this call Wayne talked at different times both to his brother and to Defendant, and one of the two men asked Wayne where they could get a firearm. Wayne testified he could not recall which of the two men asked him about the firearm; however, he admitted that he had earlier told the police it was Defendant who asked the question. He also conceded during cross-examination, however, that he might have told the police it was Defendant rather than Coley because "I was trying to help my little brother."

{18} Wayne also testified concerning the events that took place when the three men returned to Defendant's house that morning, sometime around 4:00 or 5:00 a.m. Wayne had been asleep at Defendant's house for a few hours, and was awakened when he heard Defendant, Young, and Hoff return. Wayne confirmed that one of the two men, Defendant or Young, asked him to "keep an eye on Hoff"; he could not recall, however, which of the two men said those words.

3. Testimony of Defendant

{19} Defendant testified at trial, directly contradicting both key testimony of Hoff and Wayne and facts asserted in Young's police statement. Defendant testified that in the

early morning hours, before the second trip to the victim's house, Coley used the telephone to call Defendant's house. Coley called to talk to Wayne, who was at Defendant's house at the time, to tell him they were going to pick him up. Although Defendant also talked to his father during that call, he denied asking anyone about finding a gun.

{20} After the call, the four men drove to the house where the previous drug purchase had transpired. Defendant testified that he did not participate in either the robbery or the killings. According to Defendant, when the six men were in the bedroom ingesting cocaine, Coley called Defendant out of the bedroom to talk to him. Having stepped into the bathroom with Defendant, Coley asked Defendant how much money he had; Defendant replied he had fifty dollars. Coley then said, "[Y]ou know what . . . we don't have to buy it, we can take it." Defendant replied, "We don't have to take it, we're straight." Coley appeared to relent, and the two men left the bathroom. As soon as they reached the bedroom, however, and to Defendant's surprise, Coley pulled out a firearm and said to the victims, "[T]his is a jack." He then turned to Hoff and asked, "[A]re you in or are you out?" Hoff replied, "I'm out," and left the room.

{21} Defendant testified that when Coley pulled the gun out, he told Coley to put the gun away. Coley asked the two victims where the drugs were, but they repeatedly said there were no more drugs in the house. In response, Coley stated, "[D]on't act stupid with me." Coley then put the firearm into his pants and picked up a black tool box, which he threw at the two victims. The tool box fell open, and a tire iron fell out of the box. Coley grabbed the tire iron and used it to strike one of the victims.

{22} Defendant testified that when Young returned to the bedroom, Young went over to the other victim and started "beating him up." Coley again demanded to know where the drugs were, and one of the victims responded, "[Y]ou've got all the dope[,] Coley, just take everything, I'm not going to say nothing." Coley again struck both victims with the tire iron, and continued to demand to know where the drugs were. After Coley again pulled out the firearm, he then turned, pointed it, and fired at one of the victims. At this point Defendant ran out of the house.

{23} According to Defendant, during the robbery he repeatedly told Coley to put away the firearm, and at no point did Defendant himself wield either the firearm or the tire iron. Defendant also testified that at no point did he agree to participate in, assist, or encourage the robbery in any way. He asserted that it was Coley alone who struck the two victims with the tire iron and shot them with the firearm. Defendant established that Coley was a large man, approximately six feet, two inches tall and 270 pounds, and that by comparison Defendant was much smaller – five feet, six inches tall and 170 pounds. When asked why he did not physically attempt to stop Coley from committing the armed robbery, Defendant replied, "How am I going to stop Coley? What am I going to do? All I could tell him is put the . . . gun down. . . . I can't – I'm not going to wrestle with him for the gun, I'm not going to attack him."

{24} Defendant testified that he did not remove any property from the victim's house. After the shootings, they ran out of the house, but Coley stayed behind, saying that he was going to "clean up this mess." On the ride back to Defendant's house, Hoff asked what had happened, and Defendant responded, "Coley shot them fools." There was

no further discussion on the way back to Defendant's house.

[25] When they arrived at Defendant's house, Defendant denied both telling Hoff to hang up the telephone and telling Wayne to watch Hoff. He explained by testifying that his father, who was at the house, wanted Wayne to leave. Hoff had just used the telephone to call his mother to come pick him up, and so Defendant told Wayne to get a ride with Hoff.

[26] Finally, Defendant testified that none of the stolen property was taken into his father's house. Rather, he drove the car from his father's house to "the Flume area," where the car got stuck in the sand. As they tried to extricate the car from the sand, Defendant told Young to remove the stolen property from the car. At this point, Defendant saw Young make several trips with the property to a location somewhere in the area.

4. Impermissible evidence – Young's tape-recorded statement to the police

[27] According to Young's erroneously admitted statement, just before the armed robbery commenced, Young was in the bedroom when Coley and Defendant left the room together. When Defendant and Coley returned to the bedroom, Defendant was carrying a firearm, and Coley was pulling a tire iron out of his pants. Young was somewhat equivocal on this point, and he conceded to the police that the weapons may have been reversed when they entered the room: the firearm may have been in Coley's hand and the tire iron in Defendant's. Despite this equivocation, Young's statement indicates that he witnessed

Defendant wielding the firearm at some point during the ordeal.

{28} Upon entering the bedroom, Coley said to the victims: "this is a jack" or "we're going to jack you." Coley then turned to Young and Hoff and asked, "Are you in or out?" In response, Hoff immediately left, but Young, tacitly agreeing to participate in the robbery, began taking personal property from the house out to the car. Young also admitted that at one point he struck one of the victims with his fist, denying that he himself had wielded either the firearm or the tire iron.

{29} Young made several trips out to the car with stolen property. At one point, when he returned to the house, Young stated that "the weapons had changed," and that Coley was holding the firearm and Defendant was holding the tire iron. Later, when Young was again outside at the car, Young heard several gunshots report from the house. Young went back into the house, where he saw Defendant and Coley both grabbing items from the room. Defendant and Coley then said, "[L]et's go, let's go, let's go," and the three men left the house. After a brief argument, Coley decided to stay behind, and Defendant and Young got into the car with Hoff and left. Young did not mention what happened to the stolen goods after the three men drove away.

{30} Young's statement confirmed that Wayne was at Defendant's house when the three men arrived. Young's statement also confirmed that Hoff used the telephone at one point, and that Hoff and Wayne left the house together. However, Young did not mention Defendant or anyone else telling Hoff not to use the phone or telling Wayne to "watch" Hoff. Finally, Young stated that he and

Defendant drove to "the Flumes," where the car got stuck in the sand.

D. Discussion

{31} Because our harmless-error analysis instructs that "error may be prejudicial with respect to one conviction, but harmless with respect to another," we review the effect of Young's statement with respect to each conviction separately. *Clark v. State,* 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991).

1. Armed robbery

{32} "Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence." Section 30-16-2. A conviction of armed robbery requires that the defendant commit robbery "while armed with a deadly weapon." *Id.* Under this theory, the State was required to prove, in relevant part: (1) Defendant took and carried away property from the victims or from their immediate control, intending to permanently deprive them of the property; (2) Defendant was armed with a firearm or tire iron; and (3) Defendant took the property by force or violence. *See* UJI 14-1621 NMRA 2004 (defining elements of armed robbery). Here, Hoff did not see Defendant holding either the firearm or the tire iron, and Defendant denied holding either weapon. Thus, Young's statement provided the only direct evidence at trial that "Defendant took and carried away property," that he "was armed with a firearm or tire iron," and that he "took the property by force or violence." Because Young's statement provided the only direct evidence of guilt with respect to this theory of

armed robbery, we conclude there is a reasonable possibility that its erroneous admission contributed to the verdict.

{33} The jury, however, was also instructed under a theory of accomplice liability for armed robbery; therefore, we apply our harmless-error analysis to that conviction as well. *See* NMSA 1978, § 30-1-13 (1972) ("A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission . . . although he did not directly commit the crime[.]"). To convict Defendant under a theory of accomplice liability for armed robbery, the State in this case was required to prove, in relevant part: (1) Defendant intended that the armed robbery be committed; (2) the armed robbery was committed; and (3) Defendant helped, encouraged, or caused the armed robbery to be committed. *See* UJI 14-2822 NMRA 2004 (defining elements of accessory to a crime other than attempt and felony murder). It was undisputed at trial that Defendant's alleged accomplice, Coley, committed armed robbery, thus satisfying the second element. We therefore review whether Young's statement was harmless beyond a reasonable doubt with respect to the first and third elements.

{34} Accomplice liability requires that the defendant "share the criminal intent of the principal. There must be community of purpose, partnership in the unlawful undertaking." *State v. Ochoa,* 41 N.M. 589, 599, 72 P.2d 609, 615 (1937). Indicia of such criminal intent "may be as broad and varied as are the means of communicating thought from one individual to another[.]" *Id.* Nevertheless, "[m]ere presence, of course, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient." *Id.*

{35} The State concedes this case "presents an extremely close call on the issue of harmless error." The State argues, however, even discarding Young's statement, the other evidence of Defendant's intent to commit armed robbery was so overwhelming, and the impact of Young's statement so minuscule by comparison, that it could not possibly have contributed to the verdict. *See State v. Moore,* 94 N.M. 503, 504, 612 P.2d 1314, 1315 (1980) (outlining a three-prong test to determine whether an evidentiary error was harmless).

{36} In this case, we cannot conclude beyond a reasonable doubt that Young's direct, eyewitness account was "so unimportant and insignificant" that it could not have contributed to the verdict. *Chapman,* 386 U.S. at 22. While there is much other circumstantial evidence from which reasonable inferences of Defendant's guilt might have been derived, Young's statement provides the direct evidence of Defendant's intent to commit armed robbery that rendered such inferences unnecessary. Because Hoff did not at any time see Defendant holding either a firearm or a tire iron, Young's statement provided the only direct evidence that Defendant was armed. Because Hoff did not at any time see Defendant in possession of any of the stolen property, Young's statement provided the only direct evidence that Defendant took or helped take the stolen items. Either of these facts, if believed, conclusively inculpates Defendant as an accomplice to the armed robbery, because either fact conclusively establishes Defendant's intent to commit armed robbery. With respect to the first *Van Arsdall* factor, therefore, Young's statement was of central importance to the prosecution's case against him on the charge of armed robbery.

{37} Regarding the second *Van Arsdall* factor, the State argues that portions of Young's statement were merely cumulative of Hoff's testimony on the same points, and therefore harmless beyond a reasonable doubt. *See State v. Woodward,* 121 N.M. 1, 10, 908 P.2d 231, 240 (1995) ("The erroneous admission of cumulative evidence is harmless error because it does not prejudice the defendant."). First, however, whether evidence is cumulative is merely one factor in the "host of factors" outlined in *Van Arsdall,* 475 U.S. at 684. Therefore, improperly admitted evidence that is cumulative is not *ipso facto* harmless beyond a reasonable doubt: the reviewing court must further inquire into the *effect* that evidence might have had on the jury's verdict. Second, we clarify that when determining whether certain erroneously admitted evidence is "cumulative," the reviewing court must carefully assess the degree to which that evidence corroborated other similar evidence of the defendant's guilt. To the extent the evidence corroborates, and therefore strengthens, the prosecution's evidence, it cannot be deemed "cumulative" as we understand that term.

{38} Black's Law Dictionary defines "cumulative evidence" as "[a]dditional evidence of the same character as existing evidence and that supports a fact established by the existing evidence (esp. that which does not need further support)." Black's Law Dictionary 577 (7th ed. 1999). We agree with the following articulation of the scope of the term:

> Cumulative evidence is additional evidence of the same kind tending to prove the same point as other evidence already given; evidence of other and different circumstances tending to establish or disprove the same fact is not cumulative; nor

> is evidence of facts tending to prove circumstantially the existence of a fact cumulative to evidence which tends to establish the same fact directly.

State v. Harris, 64 S.W.2d 256, 258 (Mo. 1933) (quotation marks and quoted authority omitted) (holding it was reversible error for trial court to exclude the defendant's alibi evidence on the basis that it was cumulative). Because direct evidence is of a different character than circumstantial evidence, we cannot deem evidence that tends *directly* to prove a particular fact cumulative of other evidence that tends to prove that same fact *circumstantially.*

{39} Further, we must carefully evaluate the degree to which the inadmissible evidence might have operated to *corroborate* other similar evidence of guilt. The distinction has been articulated thus: [c]orroborative evidence tends to corroborate or to confirm, whereas cumulative evidence merely augments or tends to establish a point *already proved* by other evidence. *State v. Kennedy*, 592 P.2d 1288, 1292 (Ariz. Ct. App. 1979) (emphasis added). The probative force – and therefore the possible prejudicial effect – of a particular piece of evidence tends to decrease the more redundant that evidence is in the context of other similar evidence. Therefore, only in very clear instances of accumulated evidence – where the evidence is so redundant that its corroborative effect is negligible – should the improper admission or exclusion of one accretion of such evidence be considered "cumulative" for purposes of our harmless-error analysis.

{40} The key element in this analysis is the degree to which the erroneously admitted evidence strengthened or corroborated the other evidence of guilt. If, for example,

there were three pieces of properly admitted evidence of the same character supporting the same finding of fact, the erroneous introduction of a fourth might be properly deemed cumulative, in the sense that its admission would almost certainly have a negligible corroborative effect upon the other similar evidence. *See State v. Lopez,* 2000-NMSC-003, ¶ 21, 128 N.M. 410, 993 P.2d 727 (holding that improper testimony was cumulative of testimony of three other witnesses, who each "described substantially the same events, same statements, and same description" of the crime scene, and therefore harmless beyond a reasonable doubt); *State v. Worley,* 100 N.M. 720, 725, 676 P.2d 247, 252 (1984) (holding that the inferences that might have been drawn from the silence of a codefendant not subject to cross-examination were cumulative of testimony provided by three eyewitnesses, and therefore harmless constitutional error). On the other hand, were there only one other piece of admissible evidence of the same character supporting the same finding, the inadmissible evidence in that case would clearly have had, if believed, a greater corroborative effect. Regardless of whether there exists other properly admitted evidence to support the same factual finding, therefore, the correct inquiry is whether the erroneously admitted evidence was "so unimportant and insignificant," *Chapman,* 386 U.S. at 22, that its corroborative effect upon other evidence of guilt was negligible.

{41} Here, certain portions of Young's statement, viewed in isolation, were arguably cumulative. The two admissible eyewitness accounts – Hoff's and Defendant's – establish that Defendant had a discussion with Coley in the bathroom immediately prior to the commencement of the armed robbery. Both accounts agree that Defendant

returned to the bedroom with Coley and remained with him during the entire criminal episode. Finally, both accounts agree that Defendant drove the vehicle containing the stolen property away from the crime scene. Because Defendant does not contest these particular facts, the corroborative effect of Young's statement on these points was negligible. Therefore, we may conclude that Young's additional eyewitness support on these points was cumulative.

{42} Ultimately, however, the prejudicial portions of Young's statement are not those which are uncontradicted and corroborated by multiple other sources, but those which are in dispute and which provide strong direct evidence that Defendant intended the armed robbery to be committed. Young's statement provides the only direct evidence at trial that Defendant (1) threatened the victims with a weapon during the robbery, (2) grabbed the victims' property, and (3) assisted Coley in carrying out the robbery. Contradicting this direct evidence, Defendant testified that he did not at any time hold either the firearm or tire iron, that he never touched any of the stolen items, and that he actively tried to persuade Coley to put away the firearm. While Defendant admitted remaining in the bedroom with Coley, Defendant directly disputed those portions of Young's statement that indicate Defendant intended the armed robbery to be committed and that he assisted Coley in committing the robbery. Defendant's testimony directly contradicted critical portions of Young's statement, a fact which bears on our analysis of the third *Van Arsdall* factor, "the presence or absence of evidence . . . contradicting the testimony of the witness on material points[.]" *Van Arsdall,* 475 U.S. at 684.

{43} On this point, the State asks that we not attach too much significance to Defendant's testimony because he presented no additional conflicting evidence to discredit the prosecution's case, and because the jury was free to disregard Defendant's "rather expected version of the events." As an appellate court, however, we are not in a position to judge the credibility or weight of Defendant's testimony. If it were otherwise, we would "become in effect a second jury to determine whether the defendant is guilty." *Neder,* 527 U.S. at 19 (quotation marks and quoted authority omitted). Instead, the correct inquiry is whether there exists a reasonable possibility the evidence complained of might have contributed to the jury's verdict. Defendant offered testimony which, if believed, directly contradicts crucial facts necessary for a determination that he intended the armed robbery to be committed. We cannot say, therefore, that the erroneous admission of Young's statement was harmless beyond a reasonable doubt.

{44} Arguably, one could cobble together sufficient evidence, essentially uncontested, to conclude the jury might have convicted Defendant as an accomplice to armed robbery even without considering Young's statement. The undisputed evidence that Defendant discussed robbing the two men with Coley in the bathroom, that Defendant remained in the room with Coley while the armed robbery was committed, and that Defendant drove the vehicle containing the stolen property gives rise to a reasonable inference that Defendant intended the armed robbery to be committed. We sharply distinguish, however, review for sufficiency of evidence from harmless-error review. In reviewing whether constitutional error is harmless, we do not indulge all reasonable inferences

tending to show guilt. On the contrary, we examine "whether the record contains evidence that could rationally lead" to a verdict of not guilty. *Neder,* 527 U.S. at 19.

{45} Further, we emphasize that for purposes of harmless-error review, we review not the case the State might have presented, but the case the jury actually heard. *See Sullivan,* 508 U.S. at 279. Specifically, we inquire whether the erroneously admitted evidence possibly influenced the evidence the jury actually considered, not some hypothetical pattern of evidence pieced together after the fact. In this case, the State's particular reliance at trial on Young's overwhelmingly inculpatory statement further militates in favor of a new trial. The prosecutor concluded his closing statement to the jury as follows:

> Ladies and gentlemen, I know you have your own recollection of this evidence. The key importance is the statement that was made by Jamal[l] Young against him. Not only does that statement corroborate everything that Hoff tells you, but it implicates [Defendant] in everything that they did. Everything. In for a penny, in for a pound.

It should be no surprise that the case actually presented to the jury relied so heavily on Young's statement. The prosecutor knew that Young's statement, standing by itself, would have been sufficient to convict Defendant of armed robbery: Young's account directly puts a gun in Defendant's hand and stolen goods in his pocket. This is the case the jury actually heard, and Young's statement lies at its core. We cannot conclude beyond a reasonable doubt that this evidence, which the jury actually heard, was of so little consequence that it did not contribute to the verdict.

2. Felony murder

{46} Felony murder consists of "the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . in the commission of or attempt to commit any felony[.]" Section 30-2-1(A)(2). Our case law regarding felony murder states an additional mens rea element that must be proved to the jury beyond a reasonable doubt: "an intent to kill or an intent to do an act greatly dangerous to the lives of others or with knowledge that the act creates a strong probability of death or great bodily harm." *State v. Ortega*, 112 N.M. 554, 565, 817 P.2d 1196, 1207 (1991). Here, armed robbery was the predicate felony for the felony-murder charge, and the State prosecuted Defendant for felony murder under a theory of accomplice liability.

{47} It was undisputed that Defendant's alleged accomplice, Coley, committed armed robbery "under circumstances or in a manner dangerous to human life" and that the victims were killed in the course of the armed robbery. *See* UJI 14-2821 NMRA 2004 (defining elements of accessory to felony murder). Therefore, the State in this case was required to prove, for each count of felony murder, the following four elements: (1) Defendant helped, encouraged or caused the felony of armed robbery to be committed; (2) Defendant intended that the armed robbery be committed; (3) Defendant helped, encouraged, or caused the killings to be committed; and (4) Defendant knew that he was helping to create a strong probability of death or great bodily harm. *See id.* Defendant disputed all four of these elements at trial.

{48} Because we have concluded that Young's statement was not harmless beyond a reasonable doubt with respect

to Defendant's intent that armed robbery be committed, we must also conclude the statement was prejudicial with respect to his felony-murder conviction, based as it is on the underlying felony of armed robbery. In addition, we note that, because Young's statement provided the only direct evidence that Defendant wielded the firearm or the tire iron – evidence that was directly rebutted by Defendant's testimony – we conclude that Young's statement was also prejudicial with respect to the jury's determinations that Defendant helped, encouraged, or caused the killings to be committed and that Defendant knew that he was helping to create a strong probability of death or great bodily harm.

3. Conspiracy to commit armed robbery

[49] "Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state." Section 30-28-2. An overt act is not required; the crime is complete when the felonious agreement is reached. *State v. Davis,* 92 N.M. 341, 344, 587 P.2d 1352, 1355 (Ct. App. 1978). Such an agreement need not be proven by direct evidence; the agreement may be in the form of a mutually implied understanding and may be inferred from circumstantial evidence. *Id.* at 342, 587 P.2d at 1353. There being no dispute about Coley's intent to commit armed robbery, the State was required to prove beyond a reasonable doubt both (1) that Defendant intended to commit armed robbery, and (2) that Defendant entered into an agreement with Coley to commit armed

robbery.[1] *See* UJI 14-2810 NMRA 2004 (defining elements of conspiracy).

{50} Our harmless-error analysis of the armed-robbery conviction above applies also to these two elements of conspiracy. While Defendant admits he was in the bathroom with Coley when Coley proposed the robbery, Defendant directly disputed the State's theory of the substance of that discussion when he testified that he did not agree to join in the robbery – indeed, that he thought he had persuaded Coley against it. We note that Hoff's testimony tended to corroborate Defendant's account of the bathroom conversation when Hoff said it sounded as though "one person didn't want to do it and one person did." Hoff's and Defendant's testimony on this point, if believed, would lead to a rational conclusion that Defendant had not entered into an agreement at this stage. Such a conclusion would thus heighten the importance of Young's statement with respect to the jury's determination that Defendant entered into an agreement with Coley to commit armed robbery: Young's statement provided strong direct evidence that Defendant both intended to commit armed robbery

[1] The State argues that *Crawford* does not apply to Defendant's conviction of conspiracy, on the ground that Coley's declaration of a "jack move" in Defendant's presence was one made in furtherance of a conspiracy and therefore not testimonial. *See Crawford*, 124 S.Ct. at 1367 (noting that the category of statements in furtherance of a conspiracy was an established hearsay exception by 1791, and that such statements are not testimonial). Because Coley's declaration of a "jack move" is not testimonial under *Crawford*, the State argues, it was not erroneously admitted. However, the State does not account for the hearsay-within-hearsay problem: Coley's declaration of a "jack move" appears within the broader narrative of Young's statement to the police, and it is this statement, in its entirety, that *Crawford* prohibits.

and joined with Coley in committing the armed robbery. Therefore, we cannot say its erroneous admission was harmless beyond a reasonable doubt with respect to this conviction.

4. Possession of a firearm by a felon

{51} "It is unlawful for a felon to receive, transport or possess any firearm . . . in this state." Section 30-7-16(A). There being no dispute that Defendant, in the preceding ten years, had been convicted and sentenced to one or more years imprisonment, the State was required to prove that Defendant possessed a firearm at some point during the criminal episode. *See* UJI 14-701 NMRA 2004 (defining elements of possession of a firearm by a felon). Hoff did not at any time see Defendant holding a firearm. Young's statement that he saw Defendant at one time holding the gun provides the only direct evidence that Defendant possessed a firearm. Further, Defendant expressly denied ever holding a firearm, providing evidence directly contradicting the State's otherwise circumstantial case. Young's statement providing both (1) the only direct evidence offered at trial that Defendant possessed a firearm and (2) strong circumstantial evidence from which it may be reasonably inferred that Defendant possessed a firearm, Young's statement almost surely contributed to this verdict. Therefore, its erroneous admission was not harmless beyond a reasonable doubt.

5. Tampering with evidence

{52} "Tampering with evidence consists of destroying, changing, hiding, placing or fabricating any physical

evidence with intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another." Section 30-22-5. Under a theory of liability as a principal, the State would be required to prove, in relevant part: (1) Defendant "destroyed or placed" the property taken from the victims; and (2) Defendant intended to prevent his apprehension, prosecution or conviction. *See* UJI 14-2241 NMRA 2004 (defining elements of tampering with evidence). Because the jury was instructed on a theory of accomplice liability for this charge, however, the State was required to prove at trial: (1) Defendant intended that the crime of tampering with evidence be committed; (2) the crime was committed; and (3) Defendant helped, encouraged, or caused the crime to be committed. *See* UJI 14-2822 (defining elements of accessory to a crime other than attempt and felony murder).

{53} Young's statement is silent with respect to what happened ultimately to the stolen property and whether Defendant had a role in disposing of any physical evidence. Because Young's statement did not serve to strengthen or corroborate the other evidence of guilt, we conclude its erroneous admission was harmless beyond a reasonable doubt with respect to this conviction.

{54} Because Defendant also asserts there is insufficient evidence in the record to sustain this conviction, we review "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin,* 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988) (describing the standard of review for sufficiency of evidence); *see also State v. Garcia,* 114

N.M. 269, 273-74, 837 P.2d 862, 866-67 (1992) (emphasizing the requisite scrutiny to be applied). Defendant's own testimony indicated his intent that the physical evidence be "placed" when he directed Young to remove the stolen property from the car, thus satisfying the first element of accomplice liability. Although Defendant testified he did not know what happened to the stolen property, Defendant did testify that he saw Young taking the stolen property from the car to another location. The other circumstantial evidence leads to a reasonable inference Young moved the evidence with the intent to prevent his apprehension, prosecution, or conviction, thus satisfying the second element. Finally, Defendant testified he drove the car from his father's house to "the Flume area" with the specific purpose of disposing of the stolen property, satisfying the third element. Viewing the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences in favor of the verdict, *see id.*, the State has presented sufficient evidence to support a verdict that Defendant committed tampering with evidence under a theory of accomplice liability.

III. Conclusion

{55} We reverse Defendant's convictions of conspiracy to commit armed robbery, armed robbery, felony murder, and felon in possession of a firearm, and remand for a new trial. We affirm Defendant's conviction of tampering with evidence.

{56} **IT IS SO ORDERED.**

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

PETRA JIMENEZ MAES,
Chief Justice

PAMELA B. MINZNER,
Justice

RICHARD C. BOSSON,
Justice

PATRICIO M. SERNA, Justice (concurring in part and dissenting in part)

SERNA, Justice (concurring in part, dissenting in part).

{57} I concur with the majority's application of *Crawford v. Washington*, 124 S. Ct. 1354 (2004) to Young's out-of-court testimonial statement. I also concur with remanding for a new trial on Defendant's conviction of felon in possession of a firearm and with affirming Defendant's conviction of tampering with evidence. However, I respectfully disagree with the discussion of harmless error. Applying the harmless error standard articulated by the United States Supreme Court, I would affirm Defendant's convictions of felony murder[1] and conspiracy.

{58} The majority discusses at length the meaning of cumulative evidence in the context of harmless error. The majority modifies this Court's prior understanding of

[1] The State concedes that the conviction of armed robbery would merge with the conviction of felony murder if the latter conviction were to be affirmed.

cumulative evidence by concluding that, in order to be cumulative, evidence must have no corroborative effect, or only a "negligible" effect, on other evidence of guilt. I respectfully disagree with this analysis. The United States Supreme Court has explained that one factor relevant to a constitutional harmless error inquiry is whether the erroneously admitted evidence is cumulative to properly admitted evidence. *Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986). New Mexico courts have repeatedly adhered to the general rule that the erroneous admission of cumulative evidence does not prejudice the defendant and is harmless beyond a reasonable doubt. *State v. Woodward,* 121 N.M. 1, 10, 908 P.2d 231, 240 (1995); *accord, e.g., State v. Lopez,* 2000-NMSC-003, ¶ 20, 128 N.M. 410, 993 P.2d 727 (applying *Woodward* to a Confrontation Clause violation); *State v. Martinez,* 1999-NMSC-018, ¶ 25, 127 N.M. 207, 979 P.2d 718 (applying *Woodward* to a constitutional violation); *State v. Martinez,* 1996-NMCA-109, ¶¶ 19-20, 122 N.M. 476, 927 P.2d 31 (applying *Van Arsdall* and *Woodward* to a Confrontation Clause violation and noting the cumulative nature of the evidence). I am unable to find any indication in *Van Arsdall,* or subsequent cases, that the Supreme Court's reference to cumulative evidence meant that, in order to be harmless, the evidence must be cumulative to evidence that is itself already cumulative. As the majority notes, the term cumulative simply means additional evidence of a similar character as existing evidence. The definition of this term requires duplication; it does not, in my view, require triplication or quadruplication, as the majority seems to suggest. I agree that not every instance of cumulative evidence can be considered harmless, but I respectfully disagree that harmlessness based on cumulative evidence is limited to "very clear instances of accumulated evidence." Majority opinion,

¶ 39. I respectfully do not believe this to have been the Supreme Court's intended meaning of cumulative evidence.

{59} Our cases have uniformly accepted the rationale that cumulative evidence does not cause prejudice. The majority rejects this principle based on the possibility that the erroneously admitted evidence may have had a corroborative effect on the properly admitted evidence. I respectfully believe that this rationale conflicts with the harmless error standard established by the Supreme Court, which is binding on this Court in our application of the Confrontation Clause. Under *Neder v. United States,* 527 U.S. 1, 18 (1999), appellate courts faced with a Confrontation Clause violation must answer the following question in assessing whether the error was harmless as a matter of federal constitutional law: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" This standard establishes an objective measure of harmless error under which we must evaluate the effect of a constitutional error by looking to a rational jury's evaluation of the properly admitted evidence. This standard does not contemplate an appellate reconstruction of the jury's deliberations to determine whether the jury based its decision on a particular piece of evidence. As a result, it is not necessary to speculate about a potential corroborative effect that the improperly admitted evidence had on the properly admitted evidence. By requiring inquiry "into the *effect* that evidence might have had on the jury's verdict," Majority opinion, ¶ 37, the majority applies a harmless error approach that has been specifically rejected by the Supreme Court.

{60} Under the *Neder* standard, the notion of corroboration has a different significance. If the improperly admitted evidence is corroborated by properly admitted evidence, then the importance of the improperly admitted evidence is diminished; the corroborating evidence supports the same verdict by a rational jury without reference to the improperly admitted evidence as the verdict reached by the actual jury with the improperly admitted evidence. Thus, contrary to the use of the notion of corroboration in the majority opinion, the existence of evidence corroborating the improperly admitted evidence makes it more likely that the error will be deemed harmless. *See Idaho v. Wright,* 497 U.S. 805, 823 (1990); *Van Arsdall,* 475 U.S. at 684; *see also State v. Ross,* 1996-NMSC-031, 122 N.M. 15, 27, 919 P.2d 1080, 1092.

{61} Relying on what I believe to be a mistaken view of corroboration in the context of harmless error, and focusing on the impact of the impugned evidence on the jury's actual deliberations, the majority determines that harmless error effectively requires that the improper evidence not strengthen or corroborate other evidence of guilt "[r]egardless of whether there exists other properly admitted evidence to support the same factual finding." Majority opinion, ¶ 40. Not only does this new description of harmless error conflict with *Neder,* I believe it also requires the State to prove the impossible. All evidence offered by the prosecution in a criminal trial, if properly admitted by the trial court, will to some degree strengthen or corroborate the evidence of guilt. In order to be admissible, the prosecution's evidence must be relevant, and by definition, relevant evidence has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence." Rule 11-401 NMRA 2004. In my view, this new standard adopted by the majority effectively creates a rule of automatic reversal for *Crawford*-type errors, contrary to binding precedent from the United States Supreme Court.

{62} In this case, there is no question that Young's statement was important to the prosecution. However, most of Young's statement was cumulative to or corroborated by other evidence, much of which came from Defendant himself. The only part of Young's statement that was neither cumulative to nor corroborated by other evidence is the assertion that Defendant held the gun at some point during the robbery. This part of the statement was critical for the conviction of felon in possession of a firearm, making the error prejudicial with respect to this count, but it was simply not necessary to Defendant's culpability for felony murder as an accessory. The State did not have to prove that Defendant shot the gun, held the gun, or even wielded the tire iron in order for the jury to find that Defendant helped, encouraged, or caused the crime to be committed. Young's statements that Defendant and Coley Ingram went into the bathroom in the victim's house prior to the robbery, that Coley asked Hoff whether he was in or out, that Hoff left in response to this question, and that a tire iron and gun were both used in the robbery are cumulative to Hoff's testimony, Defendant's testimony, and the physical evidence from the victims' autopsies. This evidence establishes that Defendant discussed the robbery with Coley, that he had prior knowledge of Coley's intent to commit a robbery, and that, like Hoff, he had an opportunity to extricate himself from the robbery prior to its commission and after he became aware that Coley had a gun. The use of two weapons also supports a reasonable

inference that there were multiple perpetrators of the crime.

{63} Other portions of Young's statement, those more generally implicating Defendant as a participant in the robbery and killing, in contrast to the specific statement that Defendant held the gun, are cumulative to some evidence and corroborated by a great deal of other evidence. Most significantly, Young's statement implicating Defendant as a participant in the crime is cumulative to Defendant's confession to Hoff. Although the majority describes Young's statement as "the only direct evidence that Defendant . . . participated as an accomplice in the crimes," Majority opinion, ¶ 6, Defendant's confession to Hoff is direct evidence of guilt. Defendant's confession was properly admitted evidence that was before the jury in this case. Hoff testified that Defendant told him either that Defendant or Defendant and Coley together "smoke[d]" the victims and that Defendant bragged about being a gangster as a result of the killings. Hoff further testified that, at the time of the killings, he and Defendant were friends and Coley was merely an associate of two of his friends, Defendant and Young. Hoff also testified that he remembered the incident clearly and, on rebuttal, that he was certain Defendant had not said that Coley was the one who had killed the victims. A confession of guilt by the defendant has "a profound impact" on the jury. *Arizona v. Fulminante,* 499 U.S. 279, 296 (1991).

{64} Other evidence also corroborated Defendant's participation in the crime. In his testimony before the jury, Defendant conceded that, a short time after the crime, he untruthfully told police officers that he was not at the victims' house at the time of the robbery and murder. This admitted lie to the police not only served to undermine

Defendant's credibility but also constituted substantive evidence of a consciousness of guilt. *See State v. Faubion,* 1998-NMCA-095, ¶ 13, 125 N.M. 670, 964 P.2d 834 (stating that lies to the police are evidence of consciousness of guilt); *State v. Lujan,* 103 N.M. 667, 674, 712 P.2d 13, 20 (Ct. App. 1985) (similar). As with Defendant's confession to Hoff, this admission to the police containing false information regarding the details of the crime and manifesting a consciousness of guilt is direct evidence of Defendant's participation in the crime aside from Young's statement. *See State v. Wheeler*, 802 S.W.2d 517, 519 (Mo. Ct. App. 1989). The jury also had a second, independent evidentiary basis to find a consciousness of guilt. The jury found beyond a reasonable doubt that Defendant tampered with evidence of the robbery, and this Court has determined that this conviction is supported by substantial evidence and is not tainted by Young's statement. Tampering with evidence after the fact constitutes evidence of a consciousness of guilt for the earlier crime. *State v. Martinez-Rodriguez,* 2001-NMSC-029, ¶ 24, 131 N.M. 47, 33 P.3d 267. "[T]he state of mind that is characterized as guilty consciousness or consciousness of guilt is strong evidence that the person is indeed guilty." *State v. Robertson*, 760 A.2d 82, 99 (Conn. 2000) (quotation marks and quoted authority omitted) (alteration in original); *accord Torres v. State,* 794 S.W.2d 596, 598 (Tex. App. 1990) ("A 'consciousness of guilt' is perhaps one of the strongest kinds of evidence of guilt. It is consequently a well accepted principle that any conduct on the part of a person accused of a crime subsequent to its commission, which indicates a 'consciousness of guilt' may be received as a circumstance tending to prove that he [or she] committed the act with which he [or she] is charged.") (quotation marks and quoted authority omitted).

{65} Additionally, two witnesses testified about Defendant's actions after the crime. In addition to relating Defendant's confession, Hoff testified that Defendant exited the house with Coley and Young and that Defendant had a "[v]ery calm" demeanor. Hoff also testified that when they returned to Defendant's house Defendant told him to hang up the phone and instructed Wayne Ingram to watch him to make sure he did not report the crime to the police. Defendant conceded that he, and not Young, told Wayne to leave with Hoff, although he denied telling him to watch Hoff, and Wayne corroborated Hoff's testimony by confirming that he was instructed to "keep an eye on Hoff." This testimony from two witnesses establishes that Defendant attempted to prevent the report of the crime, which again demonstrates a consciousness of guilt. The absence of Young's statement, which did not include the subject of Wayne being told to leave or watch Hoff, would not affect a rational jury's assessment of this evidence.

{66} In contrast to the abundant evidence corroborating Young's description of Defendant's participation in the robbery and murders, the only evidence conflicting with Young's statement is Defendant's self-serving, uncorroborated[2] testimony. However, Defendant's testimony was

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[2] The majority attributes to Hoff the testimony that the discussion in the bathroom sounded as though one person wanted to commit the robbery and one did not. However, Hoff's testimony directly contradicts this point. This statement came from a question by defense counsel repeating a question by an officer in an earlier interrogation of Hoff, with which Hoff had at that time only equivocally accepted as partly accurate. In response to this question by defense counsel, Hoff denied that this description of the bathroom conversation was accurate and testified that he did not remember the incident that way. The prior statement could at most only be used to impeach Hoff's testimony; because it was not made under oath, it is not substantive evidence

(Continued on following page)

undermined both by his prior inconsistent statements and by the improbability of his story. Defendant's story fails to explain how Hoff, who testified that he did not discuss the details of the crime with any participant beyond Defendant's confession, could have known that a tire iron was used in the robbery when, according to Defendant, Coley did not obtain the tire iron until after Hoff had left. In addition, according to Defendant's story, Defendant and the two victims told Coley to put away the gun. Despite this opposition by three men, Coley placed the gun in his waistband to search for a second weapon. Considering the physical evidence establishing that both victims received wounds from a tire iron, a rational jury would understand that it would have been far more likely with multiple victims for one person to hold the gun on the victims to prevent their resistance while another person beat them with the tire iron. Under these circumstances, I do not believe that Defendant's testimony can be viewed as sufficiently conflicting with Young's that, in the absence of Young's testimony, it could have led to an acquittal by a rational jury.

{67} As with the factor of cumulative evidence, the existence of evidence conflicting with the improperly admitted evidence is only one of several *Van Arsdall* factors relevant to a harmless error inquiry. The bare existence of conflicting evidence, without reference to the quality and quantity of that evidence in relation to the properly admitted evidence of guilt, does not lead to automatic reversal under the *Chapman* harmless error standard. For example, in *Ross,* despite the defendant's

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corroborating Defendant's version of events. *See* Rule 11-801(D)(1)(a) NMRA 2004.

testimony that he did not intend to kill the victim, 122 N.M. at 19, 919 P.2d at 1084, we concluded in that case that the defendant's self-serving testimony did not constitute substantial conflicting evidence in light of other evidence in the case. *Id.* at 27, 919 P.2d at 1092; *cf. United States v. Blevins,* 960 F.2d 1252, 1263-64 (4th Cir. 1992) (determining that a constitutional trial error was harmless despite the defendants' testimony denying culpability); *People v. McPeters,* 832 P.2d 146, 165 (Cal. 1992) (concluding an error was harmless because the "defendant's guilt was established by the testimony of numerous eyewitnesses as well as corroborating physical evidence, and . . . defendant's credibility was undermined by his own inherently improbable testimony denying any connection to the murder"); *Fayson v. State,* 726 N.E.2d 292, 295 (Ind. 2000) (concluding admission of co-defendant's incriminatory statement harmless beyond a reasonable doubt because eyewitness testified to the defendant's involvement and, "significantly," the defendant admitted his involvement to another witness, despite the fact that the defendant testified and denied both committing the crime and making the admission of guilt). We also concluded in *Ross* that a Confrontation Clause violation was harmless because the erroneously admitted statement was cumulative to some evidence and corroborated by other evidence. 122 N.M. at 27, 919 P.2d at 1092. I believe the same conclusion we reached in *Ross* applies in the instant case. Defendant's denial of involvement in the crimes is uncorroborated, self-serving, not fully exculpatory, impeached by two of his own prior statements, and factually improbable. As in *Ross,* given the other evidence introduced by the State, Defendant's testimony is not substantial conflicting evidence for purposes of harmless error.

{68} The jury's task in this case was not as difficult as it would be in most murder cases tried before a jury. Defendant's own testimony established that Defendant was at the scene of the crime, that he arrived at the scene with an undisputed perpetrator of the crime and had a discussion with this individual about the crime before it occurred, and that he was aware that his cohort was armed with a gun. It was also undisputed that Defendant chose to remain in the room during the robbery despite prior knowledge of Coley's intent, an awareness that Coley had a gun, and the same opportunity to leave exercised by Hoff. The only question for the jury was whether, while voluntarily in the room with his gun-wielding friend during the robbery, Defendant participated in the crime. There was an abundance of evidence heard by the jury supporting Defendant's complicity with Coley, including an eyewitness's testimony that he initiated the robbery, a confession of guilt from Defendant, powerful evidence of a consciousness of guilt, and eyewitness testimony from two witnesses of Defendant's behavior after the fact being consistent with his participation in the crime. All of this evidence was actually heard by the jury and is not a hypothetical pattern of evidence constructed after the fact. The harmless error standard established by the Supreme Court requires that we examine the evidence actually presented to the jury to determine whether a hypothetical, rational jury would have reached the same verdict without the introduction of Young's statement. Under this standard, I believe the State has established beyond a reasonable doubt that a rational jury would have reached the same verdict in the absence of Young's statement. I would therefore affirm Defendant's convictions of felony murder

and conspiracy and respectfully dissent from the majority's holding to the contrary.

PATRICIO M. SERNA,
Justice

APPENDIX B

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF EDDY
STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff, vs. TRACY JOHNSON, DOB: 03-04-1978 SSN: 525-27-4533 Defendant.	)	No. CR-2001-111-JWF

JUDGMENT, SENTENCE AND ORDER OF COMMITMENT

(Filed Apr. 5, 2002)

THIS MATTER came before the Court on April 2, 2002, for a Sentencing Hearing, the Honorable Jay W. Forbes presiding. The Plaintiff appeared by Raymond L. Romero, Assistant District Attorney, and the Defendant appeared personally and with his attorney, Gary C. Mitchell. The Defendant was convicted on November 7, 2001, pursuant to a Jury Verdict, accepted and recorded by the Court, of the following crimes: **Counts 1 and 2: Murder in the First Degree, Count 3: Armed Robbery and Count 4: Conspiracy, Count 5: Tampering with Evidence; and Count 6: Possession of a Firearm by a Felon,** having been committed on or about December 14, 2000. The Court made the following findings:

Defendant is hereby found and adjudged guilty and convicted of said crimes and is committed to the custody of

the Corrections Division of the Criminal Justice Department for the State of New Mexico for a period of Thirty (30) years, without parole, as to each of Counts 1 and 2, a period of Zero (0) days as to Count 3, a period of Three (3) years, followed by Two (2) years mandatory parole, as to Count 4, and a period of Eighteen (18) months, followed by One (1) year mandatory parole, as to each of Counts 5 and 6. Count 2 to be served consecutively to Count 1, and Count 4, 5, 6 to be served concurrently to each other and concurrently to Count 2, for a total sentence of Sixty (60) years.

Further, the Office of the District Attorney is seeking an enhanced penalty of One (1) year, as to Counts 4, 5 and 6 alleging that the above named Defendant had been convicted of a prior felony offense.

The Defendant in the above-styled and numbered cause admitted that he was one and the same person as the Defendant convicted in the following matter:

On July 15, 1996, in Cause No. CR-96-142-JWF, before the Fifth Judicial District Court, County of Eddy, State of New Mexico, the above-named Defendant was convicted of the felony crime of: Receiving Stolen Property, to-wit: a Firearm, committed on or about March 28, 1996.

By reason of the foregoing the Defendant is hereby committed to the Corrections Division of the Criminal Justice Department for a period of One (1) year as an enhancement to the above sentences on Counts 4, 5 and 6, FOR A TOTAL SENTENCE OF SIXTY (60) YEARS.

THEREFORE, you, the Sheriff of Eddy County, New Mexico, are hereby commanded to take the above-named Defendant into custody and deliver him, together with this

commitment, to the Corrections Division of the Criminal Justice Department of the State of New Mexico, which is hereby commanded to receive him and confine him for the above term.

During his period of parole, if granted, the Defendant shall obey all regulations and orders of the Adult Probation and Parole Department and observe all Federal, State and City laws or ordinances.

IT IS FURTHER ORDERED that, pursuant to the DNA Identification Act (enacted July 1, 1997), the Defendant, as a convicted felon, must submit to one or more DNA samples to the administrative center for analysis which will be placed on the Combined DNA Index System (CODIS) database. Further, the Defendant will pay a $100.00 fee for the processing of the DNA sample to the State of New Mexico.

By stipulation of the parties, Defendant shall receive pre-sentence confinement credit from December 14, 2000 to April 1, 2002, and post-sentence confinement credit to begin April 2, 2002.

IT IS FURTHER ORDERED that the Defendant shall be photographed and fingerprinted, and that fingerprint card(s), along with the photos and an attestation and certificate that the fingerprints and photos are of this Defendant, shall be made a permanent part of the Court record in this matter.

/s/ JAY W. FORBES
JAY W. FORBES,
DISTRICT JUDGE

APPROVED:

/s/ Raymond L. Romero	TELEPHONICALLY APPROVED
RAYMOND L. ROMERO	04/04/02
ASSISTANT DISTRICT ATTORNEY	GARY C. MITCHELL ATTORNEY FOR DEFENDANT
102 N. Canal Street – Suite 200	P.O. Box 2460
Carlsbad, NM 88220	RUIDOSO, NM 88345
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xc: Raymond L. Romero, Assistant District Attorney
Gary C. Mitchell, Attorney for Defendant
Adult Probation and Parole
Eddy County Sheriff's Dept.
Carlsbad Police Dept.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

September 24, 2004

NO. 27,535

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

TRACY JOHNSON,

Defendant-Appellant.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing, and the Court having considered said motion and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner,, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring, Justice Patricio M. Serna dissenting;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is DENIED.

IT IS SO ORDERED.

[seal]

WITNESS, Honorable Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 24th day of September, 2004

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s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief
Clerk of the Supreme Court
of the State of New Mexico

(2)

No. 04-844

Supreme Court, U.S.
FILED
JAN 21 2005
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF NEW MEXICO,

Petitioner,

vs.

TRACY JOHNSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted By:

John A. McCall
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Albuquerque, NM 87106
(505) 256-1998

*Counsel for Respondent**

*Admission to this court pending application sent January 19, 2005

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JURISDICTION

The Respondent opposes jurisdiction pursuant to 28 USC 1257(a) because no substantial federal question has been raised by the Petition. *Reich v. Freeport*, 388 F. Supp. 953, 955 (N.D. Ill. 1974). The issue raised by the Petitioner was also not raised by the State in this case on direct appeal. *Hanson v Denckla*, 357 US 235 (1958). Furthermore, issues involving the violation of individual rights should take priority over issues involving the protection of individual rights by a State:

> Because a state ground can only support a judgment *consistent* with a federal claim, the Court's jurisdictional presumption operates to expand this Court's review of state remedies that overcompensate for violations of federal constitutional rights. Historically, however, such cases have been outside the province of this Court. For well over a century the Judiciary Act of 1789 denied this Court authority to review state-court judgments upholding federal claims. By conferring no power to review these judgments, "the first Congress assembled under the Constitution" -- whose Members had "taken part in framing that instrument," in addition to having enacted the First Judiciary Act -- codified their conviction that this Court's overriding concern was to ensure that state courts respect federal rights.

Delaware v. Van Arsdall, 475 U.S. 673, 694-95 (1986) (Stevens, J. Dissenting) (citations ommitted). This Court will also generally not decide an issue on a federal question if there is some other basis supporting the State court's decision. In this case, the New Mexico Supreme Court decided the case in accordance with the law and the Constitution.

STATEMENT OF THE CASE

OVERVIEW

This Statement is to cure any omissions or errors in the State's Petition. The witnesses in this case testified that the Defendant, Tracy Johnson, co-defendants Coley Ingram and Jamal Young, and witnesses Jeff Hoff and Wayne Ingram, all came together on December 13, 2000 to

"party" after Jamal Young received his paycheck. They went to the liquor store in Defendant's car and bought liquor. They also obtained and used powdered cocaine from Anthony Granado upon visiting his home during the evening. They left the Granado home and returned later in the early morning hours of December 14 to obtain more powdered cocaine. During this visit, Coley Ingram and Defendant Tracy Johnson were witnessed entering the bathroom to have a discussion. The testimony and statements of Jeff Hoff conflict as to whether the two agreed to rob Granado and Ronnie Lujan or whether Johnson disagreed with Ingram about the proposal. Thereafter, the State alleges Defendant and Ingram confronted Granado and Lujan in Granado's bedroom with a tire tool and a pistol and demanded all the cocaine in the house. Defendant Johnson presented evidence that Coley Ingram, a large and aggressive man, confronted the two victims and that he did not participate. Jamal Young gave two conflicting statements, one stating that Defendant Johnson participated in the robbery and murder and one stating that he did not participate in the robbery and murder. Jamal Young took certain items from the house including an assault rifle, a Sega Dreamcaster and a stereo around the time Lujan and Granado were being beaten and murdered.

After the incident the group of young men left the house in Johnson's car with the exception of Coley Ingram who lingered at the scene outside the victims' home. There was conflicting testimony from witness Jeff Hoff regarding statements made by Defendant Johnson that he was involved in the murder. At one point Hoff testified he was not sure if Johnson said anything about being involved. Johnson testified denying any statement regarding his involvement. The group went to Johnson's Uncle's home for a few hours, then Johnson and Young to a remote location called the Flumes where Defendant testified his car became stuck and

Jamal Young unloaded the stolen goods. Neither the murder weapon or any other items involved in the crime were ever found.

TESTIMONY PRESENTED

1) Hearings on Motions in Limine

There was a hearing on October 31, 2000 on the Motions in Limine filed in the case. During that hearing the attorney for Jamal Young, Jess Cosby, presented his objections to a statement and letter from Young that the Defendant's private investigator had obtained on June 26, 2001 and then presented to Gary Mitchell, counsel for the Defendant. Young's statement and letter denied that Johnson had participated in the robbery and murder of Grandado and Lujan and explained that Young had been coerced to implicate Defendant Johnson by the murderer, Coley Ingram. The district court decided not to allow the letter and the statement in evidence because they were obtained by the Defendant's investigator acting under color of state law (without Defense attorney Mitchell's knowledge) and thus they were suppressed. The State Supreme Court did not discuss this issue, which was argued by Counsel for the State Attorney General's Office on appeal as a decision that was "right for the wrong reason."

During the aforementioned hearing on Limine, police detectives McGuire and McGilvray testified regarding the circumstances of the statement they took from co-defendant, Jamal Young. Neither of the Detectives indicated to Jamal that they believed he was the murderer. He was released after he was first picked up for interview. Defendant Tracy Johnson was arrested and held for two weeks before the other co-defendants were arrested. Detective McGuire indicated that Young said his memory of the incident was fuzzy from drugs and alcohol. Young had given an additional statement the morning of the murders and a video statement in Carlsbad the same

day. These additional statements were not addressed on appeal or admitted in evidence at trial.

David Pfeffer, the private investigator contracted by the New Mexico Public Defender Department, testified regarding the statement he took from co-defendant Jamal Young on June 26, 2001. Mr. Pfeffer testified that he was contacted by Mr. Mitchell about the investigation of Tracy Johnson's case, they spoke briefly and then he proceeded to investigate on his own. On June 26, Tracy Johnson gave him a printed letter from Jamal Young. Pfeffer requested an interview with Jamal Young and the two, after conversing over the jail's phone system, were provided with a library room where the interview could be taped. The interview was tape recorded and transcribed. Gary Mitchell, counsel for Tracy Johnson, was not contacted regarding this interview. Mr. Pfeffer explained that he knew Jamal Young had an attorney, however, he knew, as a former police officer, that he would have been allowed to speak to Jamal Young if Mr. Young volunteered to give a statement without his attorney.

Mr. Pfeffer also explained that he believed he did not have a duty to notify Jamal Young's counsel about the interview he performed. He testified that he allowed Jamal Young to give his side of the story of what happened the night of the murders. Jamal Young told Mr. Pfeffer that Coley Ingram had confessed being the "shooter" to Patrick Renfroe. He also told Pfeffer that Ingram had terrorized Young's family and made threats to Young implicating his mother.

Jamal Young took the stand to testify regarding the statement he gave to Mr. Pfeffer. Mr. Young testified that he had written the printed letter to Tracy Johnson that was at issue in the State's Motion in Limine. Mr. Young also testified that his statement in the interview, on tape with Mr. Pfeffer, was not the truth. He also testified that the letter he wrote was not the truth. He did not know why he did not tell the truth in either instance.

On cross examination by counsel for Tracy Johnson, Mr. Young admitted that everything written in the letter was written by him. He also admitted that he was not threatened or forced to give the interview with Mr. Pfeffer. Mr. Young then testified that half of the letter was true and half of it was false. Mr. Mitchell was not allowed to question Mr. Young about which parts of the letter were true, due to an objection by Mr. Cosby that was sustained by the Court. Mr. Young also testified that he did not tell his lawyer about the interview. Mr. Young testified that he did not think that he had committed "some kind of murder" when he spoke with Mr. Pfeffer. The trial court suppressed the aforementioned statements because they were taken by the public defender's investigator under color of state law. This issue was raised on appeal and was not decided by the New Mexico Supreme Court. The State argued the trial court was "right for the wrong reason" in suppressing this evidence.

2) *Trial Testimony*

The State's case began with Alicia Galindo, Ronnie Lujan's mother, who explained that Anthony Granado was living at Ronnie Lujan's apartment at the time of the shooting. Lawrence Granado, Anthony's brother, testified that he discovered the bodies of his brother and Ronnie Lujan late in the morning of December 14, 2001. He also testified that his brother had a MAK 90 assault rifle, a shotgun, a 30-30 and a 22 Long Rifle in his possession. He also testified that Anthony had recently purchased a Dreamcast.

Jeff Hoff

Twenty-three year old Jeff Hoff testified that he was a long term friend of Tracy Johnson's and that he was even closer with Jamal Young. He also knew Coley and Wayne Ingram as friends of Jamal and Tracy. Mr. Hoff admitted on cross that he was drinking two forty ounce beers and

part of a fifth of alcohol every day at the time of the incident. He was also smoking marijuana regularly at the time of the incident. He testified that he joined four of his friends late in the afternoon of December 13 and sat in the car while Tracy drove. The group went to the Hub liquor store and he witnessed Jamal, Coley and Tracy get into a fight with some other people.

Mr. Hoff was asked if he went over to Anthony Granado's house and he described Coley purchasing powder cocaine there that was consumed by himself, Tracy, Jamal, Coley, Anthony and possible Ronnie Lujan. Mr. Hoff then left the house with Tracy, Jamal and Coley and went to Defendant Johnson's house where they encountered Bobby Johnson, the Defendant's father. Mr. Hoff testified that they went back to Anthony Granado's home and they all got out of the car and knocked on the door because Coley wanted to purchase some more cocaine. They went to the back bedroom again and had some more powdered cocaine as a group with Mr. Lujan and Mr. Granado. This apparently occurred early in the morning of December 14, 2001.

Mr. Hoff testified that after the group snorted the cocaine, Tracy Johnson and Coley left the room and went into the bathroom, then he followed into the hallway outside the bathroom to see what they were doing. He opened the door of the bathroom, walked in and Tracy told him "to get out that they were handling business." On cross he admitted that he had originally told the police ". . . they tell me to get out cause that they're talking business." On re-direct he asserted that Tracy had said this. He had not heard anything prior to going into the bathroom, however, he heard arguing when he left the bathroom, maybe like anger, then he went into the hall. On cross examination he affirmed that he told the police four days after the incident that it sounded like "one person didn't want to do it and one person did."

Mr. Hoff testified that when they returned to the bedroom Mr. Johnson said "we're going to

jack them" and then Coley Ingram pulled a "tire tool type thing" from his pants and asked Mr. Hoff if he was "in or out." On cross examination, Mr. Hoff admitted he had told the police that Coley Ingram had said "we're going to jack y'all, you know, give us your sh__." On cross he also attempted to explain how Coley Ingram could have a four prong tire tool in his pants. Mr. Hoff testified he did not want any part of this and walked out the doorway, down the hall and out of the house. Coley closed the door with Jamal, Coley, Defendant Johnson, Anthony Granado and Ronnie Lujan in the room. Mr. Hoff admitted on cross examination that he never saw Defendant Johnson with a gun in his hand, with any stolen property or with any blood on him. Mr. Hoff went to the car out front and a few minutes later Jamal Young came to the car with an assault rifle. A couple minutes later Young came back to the car with either a dreamcast or a stereo. Young made another trip into the house and returned with another item. After this, Young went back into the house and Mr. Hoff heard five gunshots. A few seconds later, Coley Ingram, Jamal Young and Defendant Johnson allegedly walked out of the house. Defendant and Mr. Young came back to the car while Coley Ingram waited at the door. Defendant told Coley to come get in the car or they would leave him, however, Coley did not come back to the car and Johnson drove off.

On the way back to Defendant Johnson's house, Mr. Hoff testified that he asked, "did you smoke them?" Hoff asserted that Johnson answered "yeah." On cross he admitted to telling the police that he had asked Johnson "did *ya'll* smoke them?" On re-direct he stated he was not sure what he said. He also alleged that Johnson kept saying that he was a "G." This apparently meant a gangster. On cross he admitted that he never told the police about this alleged statement when he gave them his statement. When they arrived at the Johnson home, Hoff observed Bobby

Johnson and Wayne Ingram there. Mr. Hoff called his father, however, Tracy Johnson told him to hang up the phone and walk home before Hoff said anything to his father. Johnson then instructed Wayne Ingram to watch Hoff so he would not go to the police. Then Defendant Johnson and Jamal Young left. Hoff was not prosecuted for felony murder.

Detective Stacey McGuire and Young's Statement

Detective McGuire testified he is a felony crimes detective in Carlsbad, New Mexico. His testimony was used to introduce an interview he conducted with co-defendant Jamal Young on December 31, 2000 while Mr. Young was under arrest. The tape of the interview was admitted as evidence pursuant to the granting of the State's Motion in Limine, played, in part, to the jury and is transcribed in the transcript of this matter.

Mr. Young was read his rights, and questioned regarding the incidents of December 13 and 14. Coley Ingram's mother cashed Jamal's paycheck, then the boys might have picked up Jeff Hoff on Canal Street or at Fifth Street Park and went to the Hub to buy two bottles of E and J Brandy. While at the Hub they got into a fight apparently instigated by Coley Ingram. They went cruising around and returned to Tracy's house. They drank, played dominoes, and then they left Tracy's and went to Anthony Granado's. Jamal stated that he went to Anthony Granado's house a second time with Tracy, Coley and Jeff Hoff. He said that they were "in the room" and Coley and Tracy left, then they came back and said "this is a jack move." According to Young's statement, ". . . once he said that I didn't know what to do. I didn't know nothing about it." Jamal Young's statement goes on to posit that he believes Coley might have said "are you in our out?"

Young's statement continues with him describing how he got the stereo and the dreamcast

and took them to Jeff. Ronnie Lujan got up and Young states that he hit him and he fell on the floor and started "praying or something." Young asserted that he hit Lujan very hard and he gave him a black eye. Young also stated that he went back in the house or the room after he heard a gunshot, he saw the two victims laying on the ground, and questioned what was happening. He said, "Tracy had the crowbar and Coley had the gun at the time, or Tracy had the gun and Coley - I don't know : . ." After Mr. Young walked in and saw the bodies, "they were like let's go, let's go, let's go. . . . When we all went to the car Coley stayed there. I know he stayed because we were arguing and he said "I'm gonna stay." Subsequent to leaving the house, Tracy drove Jamal and Jeff back to his house where they encountered Wayne Ingram. Then Tracy and Jamal left to go to a place referred to as "the Flumes" where Tracy's father's car got stuck and they had to work to get the car unstuck. Mr. Young stated that they smoked a marijuana cigarette and then went to Tracy Johnson's Uncle's home.

Young could not remember seeing an "AK47 assault rifle" or any gun in the vehicle and denied ever seeing one. He also stated that he could not remember what happened to the items taken from Lujan and Granado. Finally, he could not remember who had the gun and who had the alleged tire tool. He opined that he saw both Tracy and Coley holding the tire iron. He clarified that Coley had the tire iron and Tracy had the gun "and that's when they let them know (Lujan and Granado) that they were going to get jacked." Mr. Young then stated that Coley started it and said "we're gonna jack you up." Mr. Young also stated that Coley was carrying the gun at that time. Detective McGilvray then interjected that Coley was carrying a tire iron that looked like a "T" and Jamal also agreed with this statement. Later he stated the tire iron looked like a "T" but he didn't know what happened.

Mr. Young stated that when he took the stereo, Anthony Granado looked at him and was saying "you can take everything, just take everything, I ain't gonna say nothing." The next time he came back to the room Defendant Johnson and Coley Ingram had switched weapons and Johnson had the tire iron. At this point in his statement, Young again noted that he hit Ronnie Lujan. He left the room, then he heard the shots, went to the bathroom and then into the room where he saw Johnson and Coley Ingram grabbing items, including a large black case that Coley had with him. Young admitted he probably had blood on him from the victims. When prodded he also indicated that there was an argument over the assault rifle, however, he did not remember taking it. Young did not admit to hitting the victims with a gun. He did say that Coley hit them with something.

A portion of Detective McGuire's interview was not included in the evidence presented to the jury. On cross-examination Detective McGuire affirmed that Jamal Young was drunk and using drugs at the time of the incident and his memory was fuzzy.

Wayne Ingram

Wayne Ingram, co-defendant Coley Ingram's brother, was next called to testify as an eyewitness to the events of December 13 and 14, 2000. Wayne was dropped off at Defendant Johnson's house early in the day of December 13. He did not remember how he got there. They left Tracy's house in a yellow Caprice or Impala owned by Tracy's dad. At some point they went to see Anthony Granado the first time.

The group, including Jeff Hoff, went to the Hub Liquor Store after this and an altercation broke out, at which time Wayne left the area. He went around to the front of the Hub and saw Anthony Granado and Paige purchasing liquor. Wayne left the Hub with Anthony and Paige to

go to Anthony's house. Wayne used Anthony's cell phone to try and call Tracy Johnson's house from Anthony's house. Wayne was getting ready to go back to Tracy Johnson's when Anthony's roommate, Ronnie Lujan, came home. Anthony and a girl named Christina took Wayne to Tracy Johnson's home. At Tracy's home Anthony "went in and said hi to everybody" and then he left. When Anthony was at Tracy's house Jamal, Coley, Jeff Hoff and the Defendant were there. After 30 to 45 minutes, Wayne got a ride with Patrick Renfro to get his clothes so he could come back to Tracy's home and spend the night there. He returned to Tracy's house 30 to 45 minutes later and, when he arrived, Bobby Johnson, Tracy's father, was the only person there.

Late in the night Wayne Ingram received a call from Tracy Johnson and Coley Ingram in which "[t]here was a gun involved in the situation," but he could not remember much about it. When cross-examined Mr. Ingram stated that he only mentioned that phone conversation in his July 12, 2001 statement after he knew his brother was in trouble and that he had never mentioned the call in two December, 2000 statements and his February 6, 2001 statement. Wayne was referred to a transcript of a statement he gave to the police on July 12th, 2000 and asked if he remembered stating, "About 2:00 that evening I got a phone call from Tracy asking me if I had a pistol. Do I know where he could get a gun. I told him no, and he said okay. When pressed as to the accuracy of that statement Wayne responded that he did not really know who had asked about a gun. He stated that he was "stressed out" from the questioning of the police when he was asked about the call in his police interrogation. On cross he stated that his testimony under oath was that he did not remember who had asked him about a gun.

Wayne went to sleep in Tracy's room that night, was awakened around 4:00 or 5:00 in the morning by voices and then Tracy and Jamal came into the room. He did not see Tracy with a

gun or tire-arm when he entered the room. Tracy and Jamal told Wayne "to keep an eye on Hoff," and Wayne decided to leave with Jeff Hoff. He explained on cross exam that he was to watch Hoff because of "an argument, fight or whatever." Tracy and Jamal also left the house.

Tracy Johnson

Tracy Johnson testified in his case in chief after the State rested. Around 7:00 on December 13, 2000, Tracy, Jamal, Coley, Jeff Hoff and Wayne Ingram went to Anthony Granado's house to buy cocaine and see Anthony and Rodney Gonzales. The group went back to Anthony's room and did lines of cocaine and Coley Ingram bought $50.00 worth of crack cocaine. Defendant Johnson testified that the meeting was cordial and that he had known Anthony Granado for some time, however, he did not know Ronnie Lujan. The group went back to Tracy's home and drank and played dominoes. Coley Ingram wanted to go back to Anthony and Ronnie's to obtain more cocaine. All of the young men drank from four fifths of E and J Brandy that evening. Coley drove to the liquor store when the group went back to get more liquor and that was when the fight broke out there. Coley was described as a very good fighter who was short tempered. He was bigger than Johnson and the victims and testimony revealed a very aggressive personality.

The group went to Anthony's house the second time around 4:00 or 4:30 a.m. after Coley Ingram called Tracy's house and talked to his brother, Wayne. In Anthony's room, Ronnie Lujan entered and offered a line of cocaine which each consumed, then Tracy and Coley went to the bathroom and Coley asked Tracy how much money he had. Coley then suggested that they take the cocaine and Tracy objected. Coley then walked out of the bathroom in front of Tracy and broke the hall light as he walked past it. Coley went into the room first, said "this is a jack." and

pulled a gun. He asked Jeff Hoff, "are you in our out?" And Hoff said, "I'm out." Coley told Jamal, "find the dope." Coley put the gun in his pants threw a tool box at the two and then took a tool from the tool box and hit Anthony with it. Jamal Young left the room with drugs and then returned. Coley continued to inquire as to the location of more drugs and Jamal beat Ronnie Lujan. Coley continued to hit Anthony and ask him where the rest of the drugs were located.

Tracy observed that Coley started shooting Ronnie Lujan so he ran out of the house. Tracy told Coley something to the effect of "you don't need that fu----ing gun." Tracy also told Coley to put the gun away and stated that he (Tracy) never had possession of the gun or the tire iron. Tracy came out of the house and jumped in his car as did Jamal. Coley came out of the house and Tracy told him if he did not get in the car he would leave him. Coley said he wanted to stay and clean up the blood. As they drove back to Tracy's father's house Jeff Hoff asked what happened and Tracy told him that Coley had "shot them fools." Tracy told Wayne Ingram he had to go with Jeff Hoff because he couldn't stay at Tracy's house and Jeff was calling his mother. Tracy then took Jamal to the "Flume" area and Jamal took the stolen items out of the car. Tracy Johnson denied helping rob or murder the victims in any way and stated that he told Coley Ingram not to do it.

ARGUMENT IN OPPOSITION TO GRANTING THE PETITION

INTRODUCTION

The gist of the argument presented by the State and the dissent is that, when confronted with harmless error review, the reviewing court should make inferences regarding circumstantial evidence that the jury never had the opportunity to make. The Petitioner's view is that when direct evidence is excluded on harmless error, circumstantial evidence that remains is almost

always sufficient to determine that a jury could find guilt beyond a reasonable doubt on each of the elements necessary to convict the Defendant of a crime. This view attempts to conform the harmless error analysis into a sufficiency of the evidence analysis with the improper evidence removed from the case. *See State v. Johnson*, ___ N.M. __, 98 P.3d 998, 1010 (2004). Such a view bears no regard for the effect a constitutional error has on the jury process and the corruption for which the error is responsible. *Neder v. United States*, 527 U.S. 1, 19 (1999) (we examine the record for "evidence that could rationally lead" to a verdict of not guilty.); *Delaware v. Van Arsdall*, 475 U.S. 673, 686 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.")

The New Mexico Supreme Court, adhering to *Chapman* and *Van Arsdall* has set out the basis for applying the harmless error factors in *Van Arsdall*. It has not established a new theory designed to denigrate or make irrelevant overwhelming evidence of guilt, rather it has explained when overwhelming evidence of guilt makes an error harmless.

The State's Petition does not mention that Defendant Tracy Johnson asserted several issues as error on appeal that are relevant to understanding the nature of this case. He raised the issue of the introduction of Jamal Young's *ex parte* statement as a violation of his sixth amendment rights. He also asserted the trial court erred in refusing to admit Young's statement to Defendant's investigator as rebuttal to Young's prior statement (the one improperly admitted). Other issues raised included the failure of the trial court to give a limiting instruction with respect to Young's statement, insufficient evidence on all counts and, whether the jury instruction on aiding and abetting was overly broad, failed to define aiding and abetting and failed to require

proof beyond a reasonable doubt. Finally, Johnson argued that the trial court erred in striking several jurors over objection because the rationale for striking them was their answer to a hypothetical question regarding aiding and abetting.

The State conceded the Robbery conviction was improper in its Answer Brief in the New Mexico Supreme Court because the Armed Robbery merged with the Felony Murder charge. That issue should no longer be at issue in this case.

ARGUMENT

The State argues that the New Mexico Supreme Court decided this case contrary to *Chapman v. California*, 386 U.S. 18 (1967) and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). The State mistakenly argues that the New Mexico Supreme Court now requires a reviewing court to weigh the effect of "cumulative or corroborative evidence" on other properly admitted evidence to determine the degree to which that evidence corroborated other similar evidence of defendant's guilt. Petition at 6 *citing Johnson*, at 1008. The New Mexico Supreme Court, in the case at bar, applied the *Van Arsdall* factors to determine harmless error and clarified the difference between corroborative evidence and cumulative evidence noting that "corroborative evidence tends to corroborate or confirm, whereas cumulative evidence merely augments or tends to establish a point *already proved* by other evidence." *Id.* at 1008, *citing State v. Kennedy*, 592 P.2d 1288, 1292 (Ariz. Ct. App. 1979) (emphasis in original); *see also Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) (question of harmless error is not simply whether there is other legally "sufficient evidence [of guilt] on which the accused could have been convicted without the evidence complained of."); *Kotteakos v. United States*, 328 U.S. 750, 764-65, 776 (1946); *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000); *State v. Bass*, 198 Ariz. 571, 581, 12

P.3d 796, 806 ("Evidence is cumulative, and therefore error is cured only where the tainted evidence supports a fact otherwise established by existing evidence."); Black's Law Dictionary 577 (7th ed. 1999). This distinction was made by the New Mexico Supreme Court to clarify when the second *Van Arsdall* factor, the cumulative nature of the evidence, is applicable to the question of harmless error. It must be determined whether the improperly admitted evidence was so unimportant and insignificant that its corroborative effect upon other evidence of guilt was negligible. *Johnson* at 1009, *citing Chapman* 386 U.S. at 22. This distinction is borne out in the case at bar because, as the New Mexico Supreme Court noted, Jamal Young's improperly admitted statement was the key evidence on the key elements of the crimes charged against Defendant Johnson. *Johnson* at 1010. The State's closing argument is unequivocal on this point: "The key importance is the statement that was made by Jamal[l] Young against him. Not only does this statement corroborate everything that Hoff tells you, but it implicates Defendant in everything they did." *See Chapman* 386 U.S. at 25; *Zappulla v. New York*, 389 F.3d 351, 359-60 (2nd Cir. 2004); *United States v. Joe*, 8 F.3d 1488, 1497 (10th Cir.1993) (reliance on constitutional error in closing is support for finding a lack of harmless error).

The evidence examined by the New Mexico Supreme Court revolved in part around the determination of motive to commit or aid in armed robbery, the basis for felony murder, and this evidence must be parsed carefully when the only remaining evidence, sans the improperly admitted statement, is circumstantial. *Johnson* at 1008-09; *See Zappulla v. New York*, 389 F.3d 351, 360-61 (2nd Cir. 2004). The determination of harmless error is normally made in light of certain "subjective" determinations. For example if the Defendant had been able to cross examine Young, would he have achieved an admission from Young that his subsequent statement to

Defendant's investigator was true as to the crucial pieces of evidence demonstrating the Defendant did not participate in the crimes or have the necessary intent? *Olden v. Kentucky*, 488 U.S. 227, 232-33 (1988); *Van Arsdall* at 684.

The State complains that the New Mexico Supreme Court has created a standard that permits the reviewing court to "parse the record" to determine if a jury would have convicted an accused without the inadmissible evidence." Petition at 7. This assertion, as to the creation of a new standard, is not borne out by the *Johnson* opinion. The New Mexico Supreme Court clearly delineated the second and third *Van Arsdall* factors governing cumulative and corroborative evidence and this delineation does not change the harmless error analysis, it follows it. The *Johnson* Opinion clarifies: "To the extent the evidence corroborates and therefore strengthens, the prosecution's evidence, it cannot be deemed "cumulative" as we understand that term." *Johnson* at 1008. In this case the instances in which the prosecutor's closing referred to Young's statement to support Hoff's testimony are myriad.

Van Arsdall would have no meaning if the State's theory were followed because the first factor instructs the reviewing court to evaluate "the importance of the witness testimony in the prosecution's case." the third *Van Arsdall* factor instructs the reviewing court to evaluate "the presence or absence of evidence corroborating or contradicting the testimony of the witness; and the fifth factor requires evaluation of "the overall strength of the prosecution's case." *Van Arsdall* 475 U.S. at 684; *Zappulla v. New York*, 389 F.3d 351, 356-57 (2nd Cir. 2004) (evaluating evidence just like the defective evidence from Hoff in the case at bar and finding the prosecution's case "weak" such that it had not shown harmless error beyond a reasonable doubt). The State does not explain how these evaluations can be made by the reviewing court without determining

the overall strength of the evidence left in the State's case. This evaluation can be semantically termed as subjective or objective, depending on the implication an observer wishes to make.

When the State affirms the improperly admitted evidence is "key" to the jury's understanding of Its theory of the case, the reviewing court generally cannot make a finding of harmless error without stretching beyond the bounds of *Chapman*. *See Satterwhite v. Texas*, 486 U.S. 249, 260 (1988). When the State's only other eyewitness (Hoff) contradicts himself on every single bit of testimony that would be used to find the Defendant guilty beyond a reasonable doubt on each element of the crimes without the inadmissible evidence, the reviewing court cannot make a determination that the prosecution has a "strong" case or that there is no evidence contradicting the testimony of the witness. The New Mexico Supreme Court's distinction between cumulative and corroborative evidence merely underscores this problem with the State's "weak" case and this explains why a sufficiency of the evidence review is inapplicable. The State asks this Court to review the testimony of Defendant Johnson and the testimony of Jeff Hoff and make a determination that a jury would have believed Hoff over Johnson without the corroborating effect of Young's statement which was not subject to cross examination or rebuttal. This would turn the requirement that the reviewing court find the constitutional error was harmless beyond a reasonable doubt on its head. *Neder v. United States*, 527 U.S. 1 (1999) ("the test for determining whether a constitutional error is harmless. . . . is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. . . .'") Reliance on *Neder* does not support the State's case as *Neder* is also distinguishable from the case at bar wherein the Defendant has his testimony, Hoff's conflicting testimony and conflicting prior statements to police and Young's subsequent statement to Defendant's investigator all supporting

the Defendant and the New Mexico Supreme Court's opinion. *Compare Johnson* at 1004, 1009, *with Neder* at 19 ("In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee.")

The New Mexico Supreme Court did not create a new standard in this case. Prior federal case law firmly supports the Court's evaluation of harmless error, particularly when the State relies on the error as the key element of Its argument to the jury. *Arizona v. Fulminante*, 499 U.S. 279, 297-98 (1990); *United States v. Joe*, 8 F.3d 1488, 1497 (10th Cir.1993) (reliance on constitutional error in closing supports finding a lack of harmless error); *See also Chapman* at 24-25 (the prosecution's repeated references at closing were the basis of the Court's finding error was not harmless); *C.f. Johnson* ___ N.M. ___ 98 P.3d at 1010 (The State's reliance on "Young's overwhelmingly inculpatory statement militates in favor of a new trial. . . ." and "we cannot conclude beyond a reasonable doubt that this evidence . . . was of so little consequence that it did not contribute to the verdict).

The Petitioner and the dissenting justice in this case attempted to craft a "cold case" out of thin air to support their theory. They postulate that the Defendant's guilt was established beyond a reasonable doubt because he was in the room when the crime occurred. *Id.* at 1014 (Serna, J. Dissenting) ("The State did not have to prove that Defendant shot the gun, held the gun, or even wielded the tire iron in order for the jury to find that Defendant helped, encouraged, or caused the crime to be committed."); Petition at 13-14. However, the State conceded this case was a "close call on harmless error" when arguing the case before the State Supreme Court and this

acknowledgment that the State's remaining case was weak reinforces the New Mexico Supreme Court's opinion, making the very point the State seeks to now unravel by collaterally attacking the way the *Johnson* court reached this conclusion under *Van Arsdall*. *Johnson* at 1007. One primary reason is that Hoff's testimony was conflicting and, given the *Van Arsdall* factors, Hoff's testimony was not sufficiently corroborative, thus making for a "weak" case. There is a reasonable probability that Young's statement might have contributed to the conviction given the other limited, direct, non-conflicting evidence of Johnson's mere presence when the crime was committed. *Chapman* at 23.

The State and the dissent do not parse the evidence to identify what evidence was cumulative, what was corroborative, what was conflicting, what was "close" or "weak" and what then remained without the improperly admitted statement. If this *Van Arsdall* process is carefully pursued it reveals that the Defendant was not seen with a weapon in his hand, the murderer (Coley Ingram) carried a four prong tire iron tucked in his pants for several hours that evening (according to Hoff), the Defendant was never seen taking items from the room, he was never seen to strike a victim, he argued with the acknowledged perpetrator prior to the commission of the crime (Hoff's statement to the police is indisputable on this point), he argued with the perpetrator after the crime and left him at the scene, he had no blood on him whereas the perpetrator did have blood on him (according to Hoff), and there was no eye-witness presented to contradict his assertion that he tried to stop the murderer.

Van Arsdall instructs that when there is evidence conflicting with the witness's improperly admitted statement the court must evaluate that evidence along with the strength of the State's case. Hoff was such a weak witness that finding a jury could convict on his conflicting testimony

and statements would be the same as saying that the average jury that flipped a coin to determine the truth would be entitled to deference in its decision under *Van Arsdall*. As previously noted, the State admitted this case was close a case and that fact among the host of *Van Arsdall* factors considered by the New Mexico Supreme Court weighs against a finding of harmless error). *See Kyles v. Whitley*, 514 U.S. 419, 454 (1995) ("This is not the 'massive' case envisioned by the dissent . . . it is a significantly weaker case than the one heard by the first jury . . ."). Now the State attempts to circumvent all of the *Van Arsdall* factors in Its Petition by alleging the New Mexico Supreme Court created a new standard when It distinguished between cumulative and corroborative evidence. Petition at 6; *Van Arsdall* at 695 (Justice Marshall dissenting) ("Thus, although this Court now has the power to review decisions defending federal constitutional rights, the claim of these cases on our docket is secondary to the need to scrutinize judgments disparaging those rights.") *citing* J. Choper, Judicial Review and the National Political Process 2 (1980); *See e.g. Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Justice Brandeis concurring) (". . . The Court will not pass upon a [federal] constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.")

The New Mexico Supreme Court's finding that cumulative evidence is much different from corroborative evidence does not create a new standard. *Van Arsdall* at 686-87; *Harrington v. California*, 395 U.S. 250, 254 (1969) (witness placed gun in the Defendant's hand in the store when the robbery was being committed, multiple eye witnesses corroborated details of the robbery, suppressed confessions were cumulative.) As the court in *Harrington* made clear:

We do not suggest that, if evidence bearing on all the ingredients of the crime is

> tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed.

Id. at 288. This Court in *Schneble* also found that the admission of inadmissible statements of a co-defendant was harmless error because the Defendant had confessed to the murder in grisly detail. *Schneble v. Florida*, 405 U.S. 427, 430-31 (1972). None of the cases cited by the Petitioner prohibits a reviewing court from analyzing cumulative and corroborative evidence in light of other conflicting evidence and the strength of the State's case to determine if there was a reasonable possibility that the evidence had an impact on the jury's verdict of guilty.

The Petitioner also relies on other cases in which state courts acknowledged the harmless error standard and application of the *Van Arsdall* factors. Petition at 11-12. Apparently the State is attempting to demonstrate that the court's do not subjectively scrutinize the effect of the evidence presented to the jury in an harmless error analysis. This assertion is preposterous. For example, *Hanson v. State*, 84 P.3d 320, 330 (Wyo. 2004) cites *Van Arsdall* stating: "it is plain to us that '[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" *Hanson* at 330 *citing Van Arsdall*, 475 U.S. at 680. Speculation on how the evidence would affect a reasonable jury is simply subjective evaluation no matter how it is phrased. *See Id. quoting Davis v. Alaska*, 415 U.S. 308, 317-18 (1974) ("We cannot speculate . . . whether the jury . . . would have accepted this line of reasoning had counsel been permitted to fully present it. . . . On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of

attack on the credibility of an apparently blameless witness . . .''). This analysis appears to assert that the reviewing court cannot speculate on the impact of hypothetical evidence, but the reviewing court does speculate on the impact hypothetical evidence might have on the case presented to the jury. The Wyoming Court also relied on Tenth Circuit precedent establishing harmless error when eye witness testimony is discredited. *See United States v. DeSoto*, 950 F.2d 626, 629-630 (10th Cir. 1991).

Likewise, *State v. Oscarson*, 845 A.2d 337, 348 (Vt. 2004) demonstrates a similar analysis of harmless error to that performed by the New Mexico Supreme Court at bar. The Vermont Supreme Court went further and found that un-conflicted corroborated testimony was insufficient to withstand harmless error review:

> Here, Jesse's testimony was simply too important to the State's case, and too graphic and disturbing to say it was ignored by the jury. Nor was it so fully corroborated or cumulative as to make the error meaningless. Therefore, we find that the erroneous admission of Jesse's testimony was harmful and, accordingly, reverse defendant's conviction for aggravated sexual assault on Jesse.

Id. at 349. The court then explains its harmless error review and discusses the "strength" of the State's case and the offending evidence delving into the very analysis the Petitioner states the prosecution has "never before . . . been required to show." *Id.*, Petition at 11. This discussion is, inherently, a subjective evaluation of the effect of the case on the jury:

> [W]e look to see if the strength of the offending evidence is mitigated by the third and fourth factors, that is, was the offending evidence corroborated on its material points or was it cumulative of properly introduced evidence? As we have already noted, Jesse's testimony was well corroborated by a wealth of circumstantial evidence indicating identical and simultaneous abuse of his brother Joey. But, on the material point of Jesse's testimony - that defendant touched his penis with her mouth - the corroborating evidence available to the jury was comparatively weak. Here, there was only Joey's affirmation that "I know it happened,"and circumstantial evidence of Jesse's precocious sexual knowledge - neither of which

> has the same persuasive power as Jesse's detailed and graphic descriptions of having oral sex forced upon him by his mother.
>
> . . . [B]ased on the court's instructions to the jury that it must find independent evidence of guilt of abuse of each child, we must assume that if the jury considered Joey's testimony about the abuse he suffered when deliberating on the charge for abuse of Jesse, that it did so only as corroborative evidence and not as cumulative evidence.

Id. at 351. In the case at bar, the detailed and graphic descriptions of Jamal Young were evaluated in the same manner as in *Oscarson*; following the *Van Arsdall* factors, comparing the improperly admitted direct evidence and the remaining circumstantial evidence, and seeking to evaluate whether the evidence was harmless beyond a reasonable doubt. In many ways, the cited portion of *Oscarson* demonstrates a stronger circumstantial case against the defendant than the case at bar. Certainly the Vermont Supreme Court found the prejudicial corroborative evidence was not "cumulative" just as the New Mexico Supreme Court instructs. *Johnson*, __ N.M. __, 98 P.3d at 1008.

The other cases cited by the State are not definitive regarding the evaluation of the strength of the cases and the corroborative and cumulative nature of the evidence. Petitioner's cite to *State v. Atkinson*, 276 Kan. 920, 930, 80 P.3d 1143, 1151 (2003) does not illuminate Its arguments. In that case the court found that restrictions on cross examination of a witness were improper because her "testimony and credibility were *key* to the overall strength of the prosecution's case." *Id.* (emphasis added). *Andrews v. State*, 344 Ark. 606, 617, 42 S.W.3d 484, 492 (2001), does not really address the issue as a case on point and merely quotes *Van Arsdall*. *State v. Welch*, 760 So. 2d 317, 321-22 (La. 2000), includes little analysis of *Van Arsdall* and how the factors are to be applied, merely noting that the remaining circumstantial evidence in the

case meant the court could not conclude that the conviction "was surely unattributable to the confrontation error." *Id.* at 322.

The dissent also argues, in *State v. Alvarez Lopez*, __ N.M. __, 98 P.3d 699, 718 (2004), that the majority approach in the case at bar and *Alvarez Lopez* is an "effect on the jury" approach. However, the perceived conflict is absolutely ephemeral. When a court reviews the "strength" of a case and the relative conflicting and corroborating evidence related to an impermissible statement under *Van Arsdall*, as is shown above, there is no real difference (when subjective terms like "strength" or "close" are used) in the evaluation of whether there was a reasonable probability the jury verdict would have been different or the improper evidence was harmless beyond a reasonable doubt. Very probative improper evidence in a close case (as determined by the court, not the jury (jury's do not render verdicts identifying cases as "close")) is, under most circumstances, not going to pass the harmlessness test regardless of the semantics applied.

The cases discussed in this Brief include cases where the Defendant testified, the circumstantial evidence was great and other factors were substantial or not. The reviewing courts still look to the evidence to see if there is a case remaining and they do not apply a sufficiency of the evidence test. What the New Mexico Supreme Court has done with the *Van Arsdall* factors is within its purview to apply the factors under federal law. *Alvarez-Lopez*, at 708 ("We believe 'the way we phrase the governing [harmless error] standard is far less important than the quality of the judgment with which it is applied.'") *citing Brecht v. Abrahamson*, 507 U.S. 619, 643 (1993) (Stevens, J., concurring).

The debate engendered over *Sullivan v. Louisiana*, 508 U.S. 275 (1993), *Neder* and

Chapman appears chimerical given the examples of how *Chapman* and *Van Arsdall* are put into practice. The keystone of all three cases is whether "the guilty verdict rendered in this trial was surely unattributable to the error." *Alvarez-Lopez* at 708 *quoting Sullivan* at 279. This Court has not "weighted" the *Van Arsdall* factors, state courts have in some cases, however, the focus on ensuring the Provence of the jury requires that a court examining the *Van Arsdall* factors not make a determination of guilt or innocence in the majority of occasions, but rather make a determination of whether the jury was able to get to its destination without the corrupting effects of improper evidence taking the helm of the decision making process. This Court, in *Neder*, articulated the parameter within which the New Mexico Supreme Court has operated in both *Johnson* and *Alvarez-Lopez*:

> Of course safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless.
>
> A reviewing court making this harmless-error inquiry does not, as Justice Traynor put it, "become in effect a second jury to determine whether the defendant is guilty." Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not "reflect a denigration of the constitutional rights involved." *Rose*, 478 U.S. at 577. On the contrary, it "serves a very useful purpose insofar as [it] blocks setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22.

Neder at 19 (Traynor citation omitted).

The State's Petition should be denied because the New Mexico Supreme Court has not changed the standard of harmless error. The New Mexico Supreme Court has articulated the way

in which the *Van Arsdall* factors should be applied in New Mexico courts: 1) the central focus of *Van Arsdall* is whether there is a reasonable probability the erroneous evidence might have affected the jury's verdict; and 2) distinctions must be made between cumulative and corroborative evidence, cumulative evidence that has little probative force is more likely harmless; 3) impermissible evidence that corroborates other key evidence in the case must be carefully examined for its corroborative effect on that evidence. *Johnson* ___ N.M. ___ 898 P.3d at 1004, 1008.

CONCLUSION

For the foregoing reasons Respondent Tracy Johnson requests this Honorable Court deny the State of New Mexico's Petition for Writ of Certiorari to review the judgment and opinion of the New Mexico Supreme Court.

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